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Supreme Court, U.S.
FILED

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No. ____

In The
Supreme Court of the United States

KRISTEN DAY, ET AL.,

Petitioners,

v.

RICHARD BOND, ET AL.,

Respondents,

KANSAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS, ET. AL.,

Respondent-Intervenors.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 17, 2008

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QUESTIONS PRESENTED

1. Whether, in order to establish standing to bring a preemption challenge under 8 U.S.C. § 1623 against a state law granting in-state tuition rates to illegal aliens, a U.S. citizen must also demonstrate that 8 U.S.C. § 1623 creates a private right of action.

2. Whether, in order to establish standing to bring an Equal Protection Clause challenge against a state law that treats illegal aliens more favorably than U.S. citizens in the allocation of a public benefit, a U.S. citizen must demonstrate that he would have received the public benefit even if the discriminatory provisions of state law were invalidated.

PARTIES TO THE PROCEEDING BELOW

In the United States Court of Appeals for the Tenth Circuit, Appellants were Kristen Day, Sonna L. Day, Cody Echols, David C. Eichman, Brandi P. Gillette, Christopher J. Heath, Amy E. Hughes, Jaraldyn l. Hughes, Kenneth H. Hughes, Nicole C. Keene, Heidi L Landherr, Roberta K. MacGregor, Robert R. Manzel, Karla A. Manzel, Kayla L. Manzel, Jonathan D. Miller, Mary L. Miller, Lashonda M. Montgomery, Michelle Prahl, Kyle Rohde, Marcy R. Rutan, Joshua B. Sheade, Jaime Whittenberg, and Lindsey D. Whittington.

Appellees were Richard Bond in his official capacity as the Chairman of the Kansas Board of Regents, Donnna L. Shank, Janice DeBauge, William R. Docking, Lewis L. Ferguson, Frank Gaines, Nelson Galle, James Grier, III, and Deryl W. Wynn in their official capacities as Members of the Kansas Board of Regents. Appellees in the Court below also include Cindy Derritt in her official capacity as Registrar of the University of Kansas and Monty Nielson in his official capacity as the Registrar of Emporia State University.

Defendant-Intervenor-Appellees in the court below include the Kansas League of United Latin American Citizens, the Kansas State Chapter of the Hispanic American Leadership Organization, and two Doe parties.

A motion to proceed anonymously by a group of illegal alien student Intervenors was denied, *Day v. Sebelius*, 227 F.R.D. 668 (D. Kan. 2005), and the illegal

alien students withdrew to avoid revealing their identities.

Kansas Governor Kathleen Sebelius, personally and in her official capacity, was previously a defendant, but was dismissed as a defendant prior to the appeal.

United States Representative Lamar Smith, the former United States Senator Alan Simpson, the Washington Legal Foundation, the Allied Educational Foundation, and Kansas Association of School Boards, Inc. were Amici Curiae to the proceeding.

RULE 29.6 STATEMENT

The Immigration Reform Law Institute is a nonprofit legal defense and education organization, exempt from federal taxation under Internal Revenue Code § 501(c)(3), based in the District of Columbia, and working exclusively to protect the legal rights, privileges, and property of U.S. citizens and their communities from injuries and damages caused by unlawful immigration. It has no stockholders and no parent company; it is a supporting organization under Internal Revenue Code § 509(a)(3) to another § 501(c)(3) organization: the Federation for American Immigration Reform.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding Below ii

Rule 29.6 Statement iii

Table of Authorities vii

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 1

Statement of the Case 5

Reasons for Granting the Writ 14

I. The Tenth Circuit's Merger of Standing and Private Right of Action Doctrines Conflicts with the Holdings of the Second, Fifth, and Ninth Circuits 14

A. The Tenth Circuit's Flawed Merger of Standing and Private Right of Action Doctrines 14

B. The Circuit Split Created by the Court's Merger of Standing and Private Right of Action 19

C. The Decision Below Narrows the Concept of a "Judicially Cognizable Interest in a Manner that Conflicts with other Courts 23

II. Review is Warranted to Eliminate Uncertainty Regarding the Scope of the *Jacksonville* Precedent 25

A. The Tenth Circuit's Holding Exacerbates an Existing Circuit Split and Conflicts with the Holdings of the Second, Seventh, Eighth, and Ninth Circuits .. 25

B. The Tenth Circuit's Holding Leads to Absurd Results 33

III. Allowing the Tenth Circuit's Decision to Stand Will Defeat the Intent of Congress and Will Effectively Render 8 U.S.C. § 1623 a Dead Letter 34

Conclusion 36

Appendix:

Appendix A: Tenth Circuit Decision (Aug. 30, 2007) 1a

Appendix B: District Court Memorandum and Order (July 5, 2005) 28a

Appendix C: District Court Memorandum and Order (Feb. 24, 2005) 63a

Appendix D: Tenth Circuit Order on rehearing (Dec. 17, 2007) 93a

Appendix E: Amici Curiae Brief of The Honorable Alan K. Simpson and The Honorable Lamar S. Smith In Support of Plaintiffs–appellants Urging Reversal (Oct. 26, 2005) 103a

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Able v. United States,
88 F.3d 1280 (2nd Cir. 1996) 30, 31

Armstrong v. Turner Industries, Inc.,
141 F.3d 554 (5th Cir. 1998) 21

Baker v. Carr,
369 U.S. 186 (U.S. 1962) 24

Barnes-Wallace v. City of San Diego,
471 F.3d 1038 (9th Cir. 2006) 30

Bennett v. Spear,
520 U.S. 154 (1997) 15, 23, 25

Bernhardt v. County of Los Angeles,
279 F.3d 862 (9th Cir. 2002) 21

Bowman v. Wilson,
672 F.2d 1145 (2d Cir. 1982) 20, 21

Bud Antle, Inc. v. Barbosa,
45 F.3d 1261, 35 F.3d 1355 (9th Cir. 1994) . 20, 21

Cardenas v. Anzai,
311 F.3d 929 (9th Cir. 2002) 21

Citizens for Equal Protection v. Bruning,
455 F.3d 859 (8th Cir. 2006) 28, 29

Day v. Bond,
500 F.3d 1127 (10th Cir. 2007) ..... *passim*

Day v. Bond,
511 F.3d 1030 (10th Cir. 2007) ..... *passim*

Day v. Sebelius,
376 F. Supp. 2d 1022 (Kan. 2005) 1, 10, 11

Davis v. Passman,
442 U.S. 228 (1979) 19, 20, 21, 22

Erum v. Cayetano,
881 F.2d 689 (9th Cir. 1989) 24

Federal Energy Administration v. Algonquin SNG, Inc.,
426 U.S. 548 (1976) 36

Franchise Tax Bd. of California v. Alcan Aluminum, Ltd.,
493 U.S. 331 (1990) 24

Henderson v. Fort Worth Indep. Sch. Dist.,
526 F.2d 286 (5th Cir. 1976) 24

Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk,
91 F.3d 1240 (9th Cir. 1996) 22

Initiative and Referendum Institute v. Walker,
450 F.3d 1082 (10th Cir. 2006) (en banc), *cert. denied*, 127 S.Ct. 1254 (2007) 17

INS v. Phinpathya,
464 U.S. 183 (1984) 35

Lac du Flambeau Band of Superior Chippewa Indians v. Norton,
422 F.3d 490 (2005) 28

Lewis v. United States,
445 U.S. 55 (1980) 35

Louisiana Landmarks Society, Inc. v. City of New Orleans,
85 F.3d 1119 (5th Cir. 1996) 21

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992) 15, 24

N.E. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville,
508 U.S. 656 (1993) ..... *passim*

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23 F.3d 772 (3d Cir. 1994) 24

Planned Parenthood of Houston and Southeast Texas v. Sanchez,
403 F.3d 324 (5th Cir. 2005) 20

Puerto Rico Tel. Co. v. Municipality of Guayanilla,
450 F.3d 9 (1st Cir. 2006) 20

Qwest Corp. v. City of Santa Fe,
380 F.3d 1258 (10th Cir. 2004) 13, 20

Rockefeller v. Powers,
74 F.3d 1367 (2nd Cir. 1996) 31, 32

Settles v. United States Parole Commission,
429 F.3d 1098 (D.C. Cir. 2005) 33

Silveira v. Lockyer,
312 F.3d 1052 (9th Cir. 2002) 30

Warth v. Seldin,
422 U.S. 490 (1975) 19

Western Air Lines, Inc. v. Port Authority of New York & New Jersey,
817 F.2d 222 (2d Cir. 1987) 20

Williams v. Lambert,
46 F.3d 1275 (2nd Cir. 1995) 31

Worth v. Jackson,
451 F.3d 854 (D.C. Cir. 2006) 32, 33

Constitution:

U.S. Const. Amend. XIV, Sec. 1, Cl. 4 3

Federal Statutes:

8 U.S.C. § 1601(6) 8

8 U.S.C. § 1621 7

8 U.S.C. § 1623 (2008) ..... *passim*

28 U.S.C. § 1254(1) 1, 17

28 U.S.C. § 1331 9

28 U.S.C. § 1343 9

42 U.S.C. § 1983 (2008) 2, 11

State Statutes:

110 ILL. COMP. STAT. ANN. § 305/7e-5 6

CAL. EDUC. CODE § 68130.5 6

K.S.A. 76-731a (2006) ..... *passim*

NEB. REV. STAT. § 85-502 6

N.M. STAT. ANN. § 21-1-4.6 6

N.Y. EDUC. LAW § 6301.5 6

OKL. STAT. ANN. tit. 70, § 3242 6

TEX. EDUC. CODE ANN. §§ 54.051–54.060 6

UTAH CODE ANN. § 53B-8-106 6

WASH. REV. CODE ANN. § 28B.15.012. 6

Legislative History:

142 Cong Rec S11508 (1996), Transcript Vol. VI, p. 1425. 35

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June Kronholz, *Should Illegal Immigrants Get Tuition Help?*, WALL STREET JOURNAL, Feb. 22, 2006 7

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit denying rehearing en banc is reported at *Day v. Bond*, 511 F.3d 1030 (10th Cir. 2007). The opinion of the United States Court of Appeals for the Tenth Circuit affirming the District Court's dismissal is reported at *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007). The opinion of the United States District Court for the District of Kansas is reported at *Day v. Sebelius*, 376 F. Supp. 2d 1022 (Kan. 2005).

JURISDICTION

The decision of the United States Court of Appeals for the Tenth Circuit, affirming the district court's judgment, was handed down on August 30, 2007. A timely petition for rehearing *en banc* was denied on December 17, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 8 U.S.C. § 1623 (2008):

> **Sec. 1623. Limitation on eligibility for preferential treatment of aliens not lawfully present on basis of residence for higher education benefits**
>
> (a) In general. Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be

eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

2. 42 U.S.C. § 1983 (2008):

Sec. 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

3. Equal Protection Clause, U.S. Const. Amend. XIV, Sec. 1, Cl. 4:

> No State shall...deny to any person within its jurisdiction the equal protection of the laws.

4. K.S.A. 76-731a (2006)

> Certain persons without lawful immigration status deemed residents for purpose of tuition and fees.
>
> (a) Any individual who is enrolled or has been accepted for admission at a postsecondary educational institution as a postsecondary student shall be deemed to be a resident of Kansas for the purpose of tuition and fees for attendance at such postsecondary educational institution.
>
> (b) As used in this section:
>
> (1) "Postsecondary educational institution" has the meaning ascribed thereto in K.S.A. 74-3201b, and amendments thereto; and
>
> (2) "individual" means a person who (A) has attended an accredited Kansas high school for three or more years, (B) has either graduated from an accredited Kansas high school or has earned a general educational development (GED) certificate issued within Kansas, regardless of whether the person is or is not a citizen of the United States of America; and (C) in the case of a person without lawful

immigration status, has filed with the postsecondary educational institution an affidavit stating that the person or the person's parents have filed an application to legalize such person's immigration status, or such person will file such an application as soon as such person is eligible to do so or, in the case of a person with a legal, nonpermanent immigration status, has filed with the postsecondary educational institution an affidavit stating that such person has filed an application to begin the process for citizenship of the United States or will file such application as soon as such person is eligible to do so.

(c) The provisions of this section shall not apply to any individual who:

(1) Has a valid student visa; or

(2) at the time of enrollment, is eligible to enroll in a public postsecondary educational institution located in another state upon payment of fees and tuition required of residents of such state.

(d) Any individual who: (1) Files an affidavit which contains false information; (2) fails to file an application to legalize such person's immigration status within one year of becoming eligible; (3) fails to begin the process for citizenship within one year of becoming eligible; or (4) fails to maintain an active application for citizenship after filing therefor shall not be deemed a resident of the state of Kansas for the

purpose of tuition and fees. In addition, such individual shall be required to repay the difference between the amount of fees and tuition actually paid and the amount such person would have paid as a nonresident of the state of Kansas, plus interest at a rate not to exceed the maximum under K.S.A. 16-201, and amendments thereto, for the time such individual was enrolled as a resident pursuant to this section.

STATEMENT OF THE CASE

This case is an express preemption challenge and an Equal Protection Clause challenge to a Kansas law that provides the benefit of in-state (or "resident") tuition rates to illegal aliens.[1] Petitioners, U.S. citizens who were paying out-of-state (or "nonresident") tuition rates, challenged the Kansas law. They maintained that under federal law, 8 U.S.C. § 1623, Kansas is required to give U.S. citizens in-state tuition rates if it makes such rates available to illegal aliens. The Tenth Circuit dismissed the challenge, finding that the U.S. citizen students did not have standing to maintain either their express preemption challenge under 8 U.S.C. § 1623 or their challenge under the Equal Protection Clause.

The question of whether illegal aliens should receive the public benefit of in-state tuition rates is

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[1] The challenged Kansas law is K.S.A. § 76-731a.

highly controversial.[2] Access to in-state tuition rates is an extremely valuable public benefit.[3] Since 2001, ten states, including Kansas enacted similar laws providing in-state tuition rates for certain illegal aliens.[4]

In 1996, Congress passed a sweeping statute designed to stem the mounting flow of illegal immigration into the United States—the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). A central provision of the IIRIRA was codified at 8 U.S.C. § 1623, which is the federal statute that Petitioners rely upon in bringing their express preemption claim. The text of 8 U.S.C. § 1623 reads as follows:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United

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[2] See June Kronholz, *Should Illegal Immigrants Get Tuition Help?*, WALL STREET JOURNAL, Feb. 22, 2006, p. A4.

[3] Tuition rates at the University of Kansas, for example, are estimated at $3,195 per semester for Kansas residents and illegal aliens eligible under K.S.A. 76-731a, and $8,400 per semester for Petitioners and other U.S. citizens who do not qualify for in-state tuition rates. Univ. of Kansas, "2007-2008 Tuition & Fees," http://www.tuition.ku.edu/rates.html.

[4] See CAL. EDUC. CODE § 68130.5; 110 ILL. COMP. STAT. ANN. § 305/7e-5; K.S.A. § 76-731a; NEB. REV. STAT. § 85-502; N.M. STAT. ANN. § 21-1-4.6; N.Y. EDUC. LAW § 6301.5; OKL. STAT. ANN. tit. 70, § 3242; TEX. EDUC. CODE ANN. §§ 54.051–54.060; UTAH CODE ANN. § 53B-8-106; WASH. REV. CODE ANN. § 28B.15.012.

> States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

Congress did not phrase this statute as an outright prohibition against offering in-state tuition rates to illegal aliens. Rather, Congress chose to create a statutory right to equal treatment for U.S. citizens and nationals—if any state chooses to offer a tuition benefit to any illegal aliens, then *all* nonresident U.S. citizens must be entitled to at least the same benefit.

This federal statute was part of a larger effort by Congress to prevent states from undermining the enforcement of federal immigration laws by providing public benefits to aliens who violate the law. A few months prior to enacting IIRIRA, Congress had enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). A section of that Act, codified at 8 U.S.C. § 1621, bars states from providing public benefits to illegal aliens.[5] Congress explained

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[5] There is a safe harbor provision in 8 U.S.C. § 1621, allowing a state to provide a public benefit to an alien unlawfully present in the United States by enacting a state law that "affirmatively provides for such eligibility." 8 U.S.C. § 1621(d). Petitioners' Complaint included a claim that K.S.A. 76-731a was preempted by 8 U.S.C. § 1621 as well, and that it did not meet the requirements of the safe harbor provision. The District Court held

its purpose in the words of 8 U.S.C. § 1601(6): "It is a compelling government interest to remove the incentive for illegal immigration provided by the availability of public benefits." Maintaining the rule of law in immigration becomes more difficult for the federal government if states undermine federal law by offering valuable public benefits to illegal aliens—in this case, the postsecondary education benefit of access to in-state tuition rates.

On May 20, 2004, the Kansas Legislature violated 8 U.S.C. § 1623 by enacting K.S.A. § 76-731a, titled "Certain persons without lawful immigration status deemed residents for purpose of tuition and fees."[6] The statute made certain illegal aliens eligible for in-state tuition rates at Kansas postsecondary educational institutions. No such benefit was provided to U.S. citizens who are not residents of Kansas.

Petitioners are U.S. citizen students attending public universities in Kansas and the parents of three dependent students. All are required to pay out-of-state tuition rates because they are not residents of Kansas. Illegal aliens attending the same institutions are paying in-state tuition rates, contrary to the terms of 8 U.S.C. § 1623.

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that Petitioners lacked standing to bring that claim, and Petitioners declined to appeal that aspect of the District Court decision. However, regardless of whether or not K.S.A. 76-731a meets the requirements of 8 U.S.C. § 1621(d), the terms of 8 U.S.C. § 1623 impose a separate, independent prohibition against the enactment of K.S.A. 76-731a.

[6] At the time of enactment, K.S.A. §76-731a was H.B. 2145.

Petitioners filed the complaint in this case in the U.S. District Court for the District of Kansas against the Respondent Kansas Board of Regents and university officials, as well as the Governor. The Complaint alleged jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343.

Petitioners' Complaint included seven counts, of which two are the subject of this Petition.[7] Count Two alleged that that 8 U.S.C. § 1623 expressly preempts K.S.A. § 76-731a and requires the state either to repeal the statute or to provide Petitioners access to in-state tuition rates as well. Count Seven alleged that K.S.A. § 76-731a violates Petitioners' rights under the Equal Protection Clause of the U.S. Constitution.

The Complaint requested declaratory and injunctive relief to invalidate K.S.A. § 76-731a, enjoin its further enforcement, and enjoin Respondents to reimburse Petitioners for the excess tuition and fees charged to them.

On October 20, 2004, four illegal aliens and two associations claiming to have "undocumented immigrant" student members filed a Motion to Intervene and a Motion to Proceed Anonymously, arguing that they were the intended beneficiaries of K.S.A. § 76-731a. Petitioners opposed intervention on the grounds of standing and opposed the Motion to

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[7] The District Court also held that Petitioners lacked standing to bring five other related preemption claims. Petitioners did not appeal the holding of the District Court with respect to those claims.

Proceed Anonymously. On February 24, 2005, the District Court granted the Motion to Intervene, but denied the Motion to Proceed Anonymously. *Day v. Sebelius*, 227 F.R.D. 668 (D. Kan. 2005).

On January 21, 2005, Respondents filed a Motion to Dismiss arguing that Petitioners lack standing, that 8 U.S.C. § 1623 did not include a private right of action, that K.S.A. § 76-731a was not preempted, and no valid Equal Protection Clause claim existed.

On July 5, 2005, the District Court granted the Motion to Dismiss, which the District Court converted to a Motion for Summary Judgment. With respect to Petitioners' standing to bring their challenge under 8 U.S.C. § 1623, the District Court found that Petitioners had standing to bring "a claim based upon a violation of 8 U.S.C. § 1623," 376 F. Supp. 2d at 1034, but not a claim "based on preemption" under 8 U.S.C. § 1623. *Id.*

The District Court also held that Petitioners were required to establish a private right of action to bring their preemption claim under § 1623, that no such private right of action exists, and that Petitioners lacked standing to bring their claim under the Equal Protection Clause. *Day v. Sebelius*, 376 F. Supp. 2d 1022. The Governor of Kansas was dismissed as a party, and the Plaintiffs' motion to dismiss the Intervenor-Defendants was denied.[8]

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[8] Petitioners did not appeal these aspects of the District Court's decision.

On August 1, 2005, Petitioners timely appealed to the Tenth Circuit U.S. Court of Appeals, raising three issues on appeal:

> 1. Did the District Court err in requiring the Petitioners to possess a private right of action to bring their preemption claim under 8 U.S.C. § 1623?
>
> 2. Did the District Court err in holding that no private right of action exists to bring a preemption claim under 8 U.S.C. § 1623 or 42 U.S.C. § 1983?
>
> 3. Did the District Court err in holding that the Petitioners lacked standing to bring their challenge under the Equal Protection Clause of the Fourteenth Amendment?

At the request of Respondents, the Tenth Circuit also decided the standing issue regarding Petitioners' preemption claim under 8 U.S.C. § 1623.[9]

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[9] Petitioners did not initially appeal the issue of standing to bring their preemption claim under 8 U.S.C. § 1623, because it appeared that the District Court had recognized that they possessed standing to bring this claim. "The court agrees that plaintiffs do have standing on this claim." 376 F.Supp. 2d 1022. However, there was a curious ambiguity in the holding of the District Court, which drew a distinction between between "a claim based upon a violation of 8 U.S.C. § 1623," 376 F.Supp. 2d at 1034, and a claim "based on preemption" under 8 U.S.C. § 1623. This is, of course, a distinction without a difference when the federal statute says, "No state shall do *x*." As the Tenth Circuit commented regarding the District Court's bifurcation of the 8 U.S.C. § 1623 claim, "The analytic distinction between these two claims is a diaphanous one,

On August 30, 2007, the Court of Appeals ruled on the case, addressing only the standing issues regarding Petitioners' preemption claim under 8 U.S.C. § 1623 and Petitioners' Equal Protection Clause claim. *Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007). The Court held that Petitioners lacked standing to bring either claim. *Id.* at 1133, 1135-38.

With respect to Petitioners' preemption claim under 8 U.S.C. § 1623, the Court held that the existence of standing is dependent upon the existence of a private right of action. As the Court stated, "The standing question is whether § 1623 creates a private cause of action." *Day v. Bond*, 500 F.3d 1127, at 1138. The Court's holding constrained the standing requirement so severely that no-one can possess standing to bring a preemption claim under 8 U.S.C. § 1623. As a result, state statutes that provide in-state tuition to illegal aliens in plain violation of federal law will be allowed to go unchallenged, and this modern-day nullification movement will likely continue with impunity.[10] This merger of standing and private-right-of-action requirements conflicts with the holdings of the Second, Fifth, and Ninth Circuits. As such, it creates a circuit split where none existed before.

With respect to Petitioners' Equal Protection Clause Claim, the Court dismissed the claim for lack

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and it might well dissolve upon close inspection." 500 F.3d at 1136.

[10] See Kris W. Kobach, *Immigration Nullification: In-State Tuition and Lawmakers Who Disregard the Law*, 10 N.Y.U. J. OF LEGIS. AND PUB. POLICY 473 (2007).

of standing on different grounds. The Court held that Petitioners met the injury-in-fact requirement of standing, but held that the injuries-in-fact were not caused by the operation of K.S.A. 76-731a, and their injury-in-fact would not be redressed by its invalidation. *Day v. Bond*, 500 F.3d at 1134-35.

In order to reach this holding, the Court had to construe the controlling precedent of *N.E. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993) extremely narrowly. This narrow characterization of *Jacksonville* placed the Tenth Circuit in direct conflict with the decisions of the Second, Seventh, Eighth, and Ninth Circuits, exacerbating an existing circuit-split on the subject.

Petitioners filed a petition for rehearing *en banc* on September 13, 2007. On December 17, 2007, the Circuit of Appeals denied Petitioners request for rehearing *en* banc. *Day v. Bond*, 511 F.3d 1030, 1033 (2007).

In its order, the Court attempted to clarify some aspects of its earlier decision which conflicted with prior Tenth Circuit, as well as other Courts of Appeals, precedent. In 2004, the Tenth Circuit held that "[a] party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004).

In an attempt to explain this discrepancy, the Court of Appeals concluded: "Although Plaintiffs may generally bring a preemption claim without an implied

private right of action, in this particular instance, they do not have standing to do so because they have asserted no separate injury." 511 F.3d at 1034. The Court was attempting to explain that its venture into whether a private right of action existed was pursuant to the standing question.

Petitioners timely filed this Petition on March 17, 2008.

REASONS FOR GRANTING THE WRIT

I. The Tenth Circuit's Merger of Standing and Private Right of Action Doctrines Conflicts with the Holdings of the Second, Fifth, and Ninth Circuits

In addition to the court's errors below in not recognizing actual injury from U.S. citizens' failing to obtain the equality of treatment promised by 8 U.S.C. § 1623, the decision below has created conflicts with other appellate circuits in three areas: merging doctrines of standing and private rights of action; narrowing the definition of judicially-cognizable injury; and applying this Court's decision in *N.E. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993).

A. The Tenth Circuit's Flawed Merger of Standing and Private Right of Action Doctrines

The Tenth Circuit's merging of standing and private-right-of-action requirements is in direct conflict with the holdings of the Second, Fifth, and

Ninth Circuits. As such, it creates a circuit split where none existed before.

It is well established that standing requires an "injury in fact," defined as "an invasion of a legally protected interest." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This Court would later broaden the concept of "legally protected interest" somewhat by restating it as a "judicially cognizable interest." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). Petitioners' judicially cognizable interest in this case is their substantive right under 8 U.S.C. § 1623 to receive in-state tuition rates if any illegal alien at a public college or university in Kansas receives that benefit.

To comprehend the Tenth Circuit's erroneous merger of standing and a private right of action, it is important be clear as to the injury-in-fact asserted by Petitioners. In this case, Petitioners are nonresident U.S. citizen students who admittedly would not normally be eligible for in-state tuition rates at public universities in Kansas. However, by enacting 8 U.S.C. § 1623, Congress gave Petitioners a federal statutory right to receive the same postsecondary education benefits afforded to any illegal aliens in the state. This was a deliberate Congressional choice: Congress did not ban in-state tuition for illegal aliens; instead it gave a right of equality to U.S. citizens and legal residents.

According to the express terms of 8 U.S.C. §1623, if a state grants the benefit of in-state tuition rates to any illegal alien, then all U.S. citizens must be "eligible for such a benefit (in no less an amount,

duration, and scope) without regard to whether the citizen or national is such a resident." If Petitioners are correct in their interpretation of the meaning of 8 U.S.C. § 1623 (which is a determination on the merits of their claim, so, in considering a Motion to Dismiss, it must be assumed to be correct), then they have a substantive right to receive the same tuition benefit afforded to any illegal alien at a public college or university in Kansas.

Under the express language of § 1623, it is Kansas's choice: if Kansas decides to give illegal aliens in-state tuition rates, then it must, by federal law, give the same rates to U.S. citizen students without regard to residence. If Kansas decides to give illegal aliens in-state tuition rates, but does not give the same rates to U.S. citizen students, who is hurt? And the amount of injury is readily calculable: the difference between in-state and out-of-state tuition.

However, the Court of Appeals erred by making the existence of a "judicially cognizable interest" for standing purposes dependent upon the existence of a private right of action. The flawed reasoning of the Court of Appeals is best illustrated by the following passage:

> Practically speaking, *Walker* mandates that we assume, during the evaluation of the plaintiff's standing, that the plaintiff will prevail on the merits—that is, that the defendant has violated the law. ... But there is still work to be done by the standing requirement.... Here, the issue of standing is not necessarily determined by the merits determination. The merits issue is

> whether K.S.A. § 76-731a is preempted by 8 U.S.C. § 1623. The standing question is whether § 1623 creates a private right of action.

Bond, 500 F.3d at 1137-38 (referring to *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc), cert. denied, 127 S.Ct. 1254 (2007)). It appears that the Court of Appeals wanted "work to be done" by the injury-in-fact requirement of standing, and decided that requiring the existence of a private right of action would be the appropriate way of raising the standing hurdle.

The Court of Appeals restated its conflation of standing and private right of action doctrines at numerous points in the opinion, referring to "[t]he question whether a federal statute confers a private cause of action under 42 U.S.C. § 1983—and concomitantly an injury for purposes of evaluating standing." *Bond*, 500 F.3d at 1138. According to the Court, the question was "[w]hether we are required to accept the Plaintiffs' assertion of a private, enforceable right under § 1623 for purposes of our review of standing." *Id.* at 1136. The Court reiterated: "The standing question is whether § 1623 creates a private cause of action." *Id.* at 1138.

Even in its decision denying Petitioners a rehearing en banc, the Tenth Circuit reiterated that "We affirmed the district court's dismissal of the preemption claim after concluding that Plaintiffs lacked standing *because* § 1623 did not confer a private right of action." *Bond* (II), 511 F.3d at 1032 (emphasis added). The Court again described its holding as "our

decision requiring a private right of action to establish standing for their preemption claim..." *Id.* at 1034.

Of course, the existence of a private right of action has nothing to do with Petitioners' asserted injury-in-fact. Petitioners' judicially cognizable interest is not an abstract interest in bringing a lawsuit in an Article III Court. Rather it is a statutorily-created substantive interest with real monetary value: the interest in receiving the same discounted tuition rate as that received by the illegal alien beneficiaries of K.S.A. 76-731a. The increasing cost of public university tuition is an onerous burden and an increasingly prohibitive barrier for millions of citizens aspiring to the advantages of higher education.[11] If Petitioners are correct in their interpretation of 8 U.S.C. § 1623, then they are correct that their judicially cognizable interest created by that statute has been deliberately invaded by the state of Kansas; and they were wrongly denied standing by the Court of Appeals.

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[11] The cost of college tuition has been rising faster than consumer prices and personal income for the past twenty-five years. Two-thirds of college students now graduate with debt, which averages $19,200. Sandra Block, *Rising Costs Make Climb to Higher Education Steeper; Parents, Students Wonder Why Tuition, Fees Increase So Rapidly*, USA TODAY, Jan. 12, 2007, at B1.

B. The Circuit Split Created by the Court's Merger of Standing and Private Right of Action

The Court's merger of standing and private right of action doctrines placed the Tenth Circuit at odds with the Second, Fifth, and Ninth Circuits—all of which have taken pains to keep the doctrines analytically distinct and independent. All of these Circuits have adhered to the holding of this Court in *Davis v. Passman*, 442 U.S. 228 (1979), which explained that standing and a right (or "cause") of action are analytically distinct concepts:

> *[S]tanding* is a question of whether a plaintiff is sufficiently adversary to a defendant to create an Art. III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction, see *Warth v. Seldin*, 422 U.S. 490, 498 (1975); *cause of action* is a question of whether a particular plaintiff is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court.... The Court of Appeals appeared to confuse the question of whether petitioner had standing with the question of whether she had asserted a proper cause of action.

442 U.S. at 239 n.18 (emphasis in original). In its unusual merger of the concepts of standing and private right of action, the Court below inexplicably made no reference to *Davis v. Passman* or its progeny.

In contrast, the Second, Fifth, and Ninth Circuits have carefully kept the doctrines analytically distinct

and independent. The Second Circuit has explained the distinction most clearly:

> The distinction between a dismissal for lack of standing based on a failure to satisfy the zone of interest test and a dismissal for failure to state a cause of action can best be illustrated when courts are called upon to imply causes of action under statutes not expressly providing a remedy to a particular class of litigants. ... When the question is whether any plaintiffs are entitled to relief under a statute which does not expressly provide the relief which is sought, the question is properly framed as whether a cause of action can be implied.... In contrast, when there already exists a cause of action prescribing a particular remedy for a defined class of persons and the question is simply whether a particular plaintiff is also entitled to that relief, the question is properly addressed as one of standing. In such a case, the inquiry focuses on whether the plaintiff is the proper person to press the claim.

Bowman v. Wilson, 672 F.2d 1145, 1151 n.10 (2d Cir. 1982) (*citing Davis v. Passman*, 442 U.S. at 239 n.18).[12]

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[12] In the present case, of course, the configuration of the issues is different, because Petitioners are asserting a preemption claim—for which no private right of action is necessary. *Qwest* 380 F.3d at 1266; *Puerto Rico Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 16 (1st Cir. 2006); *Western Air Lines, Inc. v. Port Authority of New York & New Jersey*, 817 F.2d 222, 225 (2d Cir. 1987); *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324, 330-335 (5th Cir. 2005); and *Bud Antle,*

The Fifth Circuit has similarly kept the doctrines of standing and private right of action distinct and independent. "Standing is a concept distinct from the concept of private rights of action." *Louisiana Landmarks Society, Inc. v. City of New Orleans*, 85 F.3d 1119, 1122 n.3 (5th Cir. 1996). See also *Armstrong v. Turner Industries*, Inc., 141 F.3d 554, 559 (5th Cir. 1998) (*citing Davis v. Passman*, 442 U.S. at 239 n.18).

Likewise, the Ninth Circuit has on numerous occasions reiterated the basic principle of *Davis v. Passman* that an inquiry into standing is independent of any inquiry into the existence of a private right of action. "Whether a party has standing is distinct from whether she has asserted a cause of action." *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 868 n.4 (9th Cir. 2002) (*citing Davis v. Passman*, 442 U.S. at 239 n.18). See also *Cardenas v. Anzai*, 311 F.3d 929, 933-34 (9th Cir. 2002).

Although these Circuits have drawn a careful distinction between standing and private right of action doctrines, the Ninth Circuit has noted that many federal courts seem to have difficulty maintaining this distinction. In admonishing a district court that appeared to be engaging in a search for a

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Inc. v. Barbosa, 45 F.3d 1261, 1269, 35 F.3d 1355 (9th Cir. 1994). However, the standing inquiry still remains "whether the plaintiff is the proper person to press the claim," *Bowman*, 672 F.2d at 1151, n.10., as opposed to an improper interpretive inquiry into whether Congress intended to create a private right of action.

private right of action in order to assess a litigant's standing, the Ninth Circuit stated:

> Federal courts sometimes characterize their inquiry into whether the plaintiff has a cause of action as one that concerns the party's "standing". Despite the fact that courts occasionally (and perhaps inadvertently) use the term "standing" when undertaking such inquiries, the Supreme Court has made it clear that the question whether a party has standing is distinct from the question whether it has asserted a valid cause of action. ... The former question concerns "whether a plaintiff is sufficiently adversary to a defendant to create an Article III case or controversy, or at least to overcome prudential limitations on federal-court jurisdiction[.]" *Davis*, 442 U.S. at 239 n.18. The latter question concerns whether a plaintiff may, as a matter of law, "use the courts to enforce the right at issue. The focus must therefore be on the nature of the right petitioner asserts." Id. Standing is generally held to be jurisdictional, while the question of whether a cause of action exists is not.

Indian Oasis-Baboquivari Unified Sch. Dist. No. 40 v. Kirk, 91 F.3d 1240, 1246 n.1 (9th Cir. 1996). Because it is not uncommon for inferior Article III Courts to erroneously merge the concepts of standing and private right of action, review is warranted. This case presents an opportunity for this Court to offer additional guidance that will aid lower courts in distinguishing between the two doctrines.

C. The Decision Below Narrows the Concept of a "Judicially Cognizable Interest in a Manner that Conflicts with other Courts

The injury-in-fact requirement of Article III standing entails injury to a "judicially cognizable interest." *Bennett*, 520 U.S. at 167. Petitioners' judicially cognizable interest that has been invaded by K.S.A. 76-731a is the interest created and protected by 8 U.S.C. § 1623—namely the right of U.S. citizen students to receive "any postsecondary education benefit" offered to "an alien who is not lawfully present in the United States."

The benefit at issue here has significant financial value. The difference between resident and nonresident tuition rates in Kansas adds up to more than $20,000 over the course of a four-year college education. If Petitioners prevail on their preemption claim, K.S.A. 76-731a would be invalidated. If the state wished to continue offering in-state tuition to illegal aliens, it would have to offer the same benefit to Petitioners. If on the other hand, the state chose the other option permitted by 8 U.S.C. § 1623—offering in-state tuition rates to *neither* illegal aliens nor Petitioners—Petitioners would still realize their statutorily-protected interest in being treated no worse than illegal aliens in the allocation of postsecondary educational benefits.

In addition to erroneously conflating the issues of standing and private right of action, the Court of Appeals below has drastically narrowed the concept of an injury to a judicially cognizable interest. The Court has effectively required that the interest be one that is

spelled out in a federal statute as an individual right that includes a private right of action.

This unduly narrow conception of a judicially cognizable interest is incorrect. A judicially cognizable interest need not be spelled out in a statute. Similarly, it need not be spelled out in a way that includes a private right of action. A judicially cognizable interest is any interest that a court regards to be sufficiently "concrete and particularized," *Lujan*, 504 U.S. at 560, to guarantee "a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (U.S. 1962). It may be a financial interest. *Franchise Tax Bd. of California v. Alcan Aluminum, Ltd.*, 493 U.S. 331, 336 (1990). It may be a general interest in "access to information or judicial proceedings." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994). Or it may simply be a voter's interest in seeing a candidate that he prefers on a ballot. *Henderson v. Fort Worth Indep. Sch. Dist.*, 526 F.2d 286 (5th Cir. 1976); *Erum v. Cayetano*, 881 F.2d 689 (9th Cir. 1989). Prior to this case, no court has ever been so restrictive in its application of standing doctrine as to require the existence of a private right of action in a statute for a plaintiff to possess standing.

In sum, the Tenth Circuit has significantly constrained the standing doctrine. It has erroneously substituted its requirement of a "private, individualized right" spelled out in federal statute, 500 F.3d at 1136, for this Court's requirement of a

"judicially cognizable interest." *Bennett*, 520 U.S. at 167. In so doing, the Court below has denied Petitioners the opportunity to vindicate a substantive right that *is*, ironically, spelled out in federal statute.

II. Review is Warranted To Eliminate Uncertainty Regarding the Scope of the *Jacksonville* Precedent

A. The Tenth Circuit's Holding Exacerbates an Existing Circuit Split and Conflicts with the Holdings of the Second, Seventh, Eighth, and Ninth Circuits

While the Court's holding with respect to standing to bring a preemption claim under 8 U.S.C. § 1623, created a new circuit split, the Court's holding with respect to Petitioners' standing to bring their Equal Protection Clause challenge significantly exacerbated an existing circuit split. Petitioners' claim that K.S.A. § 76-731a unconstitutionally discriminates against U.S. citizens and in favor of illegal aliens. Petitioners and the illegal alien beneficiaries of K.S.A. § 76-731a are similarly situated in that neither is legally domiciled in Kansas. Yet the statute discriminates against the citizens by excluding them from this benefit while awarding it to the illegal aliens.

Petitioners are injured in two ways. First, the denial of equal treatment, in and of itself, is an injury-in-fact caused by barriers in K.S.A. § 76-731a, which make it impossible for nonresident U.S. citizens to obtain the benefits extended by the statute. Second, the significant extra tuition paid at nonresident rates by Petitioners, over and above the in-state tuition paid

by nonresident illegal aliens, due to the discriminatory operation of K.S.A. 76-731a, is an injury-in-fact.

The Court below held that these two forms of injury meet the injury-in-fact requirement of standing, but held that they were not caused by the operation of K.S.A. 76-731a and therefore would not be redressed by its invalidation. *Day v. Bond*, 500 F.3d at 1134-35.

Yet the first injury is redressable simply by eliminating the unequal treatment through judicial invalidation of the program that distributes benefits in a discriminatory fashion. The second injury is redressable by an order enjoining Respondents to adjust the wrongful charges to the Petitioners' tuition accounts by means of tuition credits, rebates, or refunds, as would normally occur with any charge wrongly levied by a university.

With respect to the second injury, the Court of Appeals completely ignored the availability of, and request for, this mundane form of relief and, indeed, offered no explanation of why the injury was not redressable. *Id.* at 1133-34. However, it is with respect to the first form of injury that the Court of Appeals contributed to an existing circuit split.

Ever since this Court handed down its decision in *N.E. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville*, 508 U.S. 656 (1993), confusion and uncertainty has existed among the Circuits as to its scope. In *Jacksonville*, this Court evaluated an Equal Protection Clause challenge to a minority set-aside program for government contractors. The Court held that it is not necessary for the plaintiff to show that he

would have received the sought-after benefit if the challenged law were not in place. Simply removing the barrier is sufficient remedy for standing purposes, even if the plaintiff would still be unable to obtain the benefit. In the words of this Court:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. *The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.*

Id. at 666 (emphasis added). Those words were pregnant with meaning. They were also subject to different interpretations by the various Circuits. In particular, there has been uncertainty regarding the meaning of the words, "the ultimate inability to receive the benefits."

In the ensuing fifteen years, the Circuits have differed widely regarding how far to extend the *Jacksonville* reasoning. Most Circuits have applied *Jacksonville* outside of the context of set-aside programs and competitive bidding. However, two Circuits have been reluctant to do so. The Tenth Circuit here applied the *Jacksonville* precedent in extraordinarily narrow fashion, limiting its scope only to those cases in which the plaintiff successfully "demonstrate[s] that he *could* have obtained the

benefit." 500 F.3d at 1135. (emphasis in original). If "nondiscriminatory classifications would disqualify him from eligibility for the benefit even absent the challenged discriminatory classification...he therefore lacks standing." *Id.*

This narrow reading of *Jacksonville* places the Tenth Circuit in direct conflict with the decisions of the Second, Seventh, Eighth, and Ninth Circuits. The most direct conflict is with the Seventh Circuit, which stated unequivocally that the removal of a discriminatory barrier to an application, in and of itself, is sufficient remedy for standing purposes. "The possibility that Wisconsin might reject [the plaintiff's] application for *legitimate* reasons is therefore irrelevant to the standing analysis." *Lac du Flambeau Band of Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005) (emphasis added). This holding is diametrically opposed to the Tenth Circuit's narrow view that a plaintiff lacks standing if "nondiscriminatory classifications would disqualify him" anyway. 500 F.3d at 1135.

The Eighth Circuit, in *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006), a case structurally similar to the case at bar, reached the same conclusion as the Seventh Circuit. In *Bruning*, the plaintiff was a public interest group with gay and lesbian members that challenged a Nebraska constitutional amendment limiting marriage to heterosexual unions. The challenge was brought under the Equal Protection Clause. The Eighth Circuit noted that if Nebraska's constitutional amendment were struck down, the members of the plaintiff group still would not be entitled to the

benefits of marriage, because under Nebraska statutes "marriage and domestic partnership licenses are not available to same-sex couples...." *Bruning*, 455 F.3d at 863. Citing *Jacksonville*, the Eighth Circuit held that even though the plaintiffs would still not be entitled to receive marriage licenses in the state of Nebraska, the removal of the discriminatory barrier itself would be sufficient to confer standing on the plaintiffs. *Id.*

The similarity to the present case is clear. Petitioners challenge a discriminatory provision in Kansas law that makes a benefit available to similarly-situated illegal aliens, but by its express terms, excludes U.S. citizens.[13] Petitioners acknowledge that if the law is struck down, they may not be able to obtain in-state tuition rates (depending upon what the state Kansas decides to do, to comply with 8 U.S.C. § 1623). But the removal of the discriminatory barrier, in and of itself, is a sufficient remedy for the purposes of standing.

The Ninth Circuit has also applied *Jacksonville* broadly—extending its reach to situations where reaching the merits of an equal protection clause challenge would potentially remove a benefit for a favored class while nevertheless keeping the plaintiffs in a situation where they did not receive the benefit.

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[13] The exclusion of U.S. citizens occurs in K.S.A. 76-731a(b)(2), (d)(3), and (d)(4), which include requirements that U.S. citizens cannot satisfy; and in K.S.A. 76-731a(c)(2), which excludes anyone eligible for resident tuition in another state—thereby excluding all U.S. citizens who are not residents of Kansas, because they are legally regarded as residents of another state or territory.

The context was a challenge to California's assault weapons law. The plaintiffs challenged the law's restrictions on Second Amendment grounds, but they also challenged the fact that the law made exceptions for active police officers while off duty, as well as for retired police officers. Those exceptions were challenged under the Equal Protection Clause. The Ninth Circuit applied the *Jacksonville* precedent and held that the plaintiffs possessed standing to bring their equal protection claim—even though eliminating the exceptions would not result in the benefit being extended to the plaintiffs. *Silveira v. Lockyer*, 312 F.3d 1052, 1087-88 (9th Cir. 2002). The Ninth Circuit has also applied the *Jacksonville* precedent in contexts outside of Equal Protection Clause Challenges, specifically to a case in which preferential access to public facilities was challenged on Establishment Clause grounds. See *Barnes-Wallace v. City of San Diego*, 471 F.3d 1038 (9th Cir. 2006).

However, these holdings of the Seventh, Eighth, and Ninth Circuits are somewhat restrictive when compared to those of the Second Circuit. Without question, the Second Circuit has applied *Jacksonville* more broadly than any other Circuit. The Second Circuit has repeatedly applied the *Jacksonville* principle *outside of the context of public benefits*, holding essentially that any time the state treats one group less favorably than another group, the members of the disfavored group affected by the statute or regulation at issue have standing to challenge the differential treatment. For example, in *Able v. United States*, 88 F.3d 1280 (2nd Cir. 1996), the Second Circuit concluded that the *Jacksonville* precedent supported the standing of homosexual plaintiffs to

challenge the U.S. military's so-called "Don't ask, don't tell" policy restricting homosexual conduct. The case concerned no government benefits whatsoever. *Able*, 88 F.3d at 1291.

Similarly, the Second Circuit applied *Jacksonville* to support the standing of the mother of an illegitimate child to challenge a New York state law that precluded re-examination of a support agreement between parents of illegitimate children, but allowed re-examination of an agreement between parents of legitimate children. *Williams v. Lambert*, 46 F.3d 1275 (2nd Cir. 1995). Again, no public benefit was at issue in the case. The Court also held that the plaintiff need not show that access to the support agreement process would produce any modification in her favor. "Just as the contractors [in *Jacksonville*] did not have to show that they would have obtained the contracts had they bid, Williams need not show that she could successfully modify the support agreement if she were given access to the modification procedure." *Williams*, 46 F.3d at 1280.

In another case that did not involve the allocation of public benefits, *Rockefeller v. Powers*, 74 F.3d 1367 (2nd Cir. 1996), the Second Circuit had no hesitation in applying the logic of *Jacksonville*. *Rockefeller* involved a challenge by Republican voters to a New York state law imposing a petition requirement for delegate candidates to the Republican presidential primary. Plaintiffs alleged that the requirement discriminated against voters from districts having relatively few registered Republicans. The Court held that, "Under *Northeastern Florida [v. Jacksonville]*, they need not establish that, absent the current rule,

they *necessarily* would see more candidates on their ballot." Rockefeller, 74 F.3d at 1376 (emphasis in original). No other Circuit has taken such an expansive view of the *Jacksonville* precedent.

While these Circuits have all applied the *Jacksonville* precedent broadly, not limiting it to circumstances in which a plaintiff could necessarily obtain the benefit sought (and in the case of the Second Circuit, not even limiting it to public benefits), one Circuit has embraced a much narrower view, similar to that of the Tenth Circuit. The U.S. Court of Appeals for the District of Columbia Circuit has suggested that *Jacksonville* only applies to affirmative action plans that give preferences to minority candidates in the allocation of contracts or jobs.

In *Worth v. Jackson*, 451 F.3d 854 (D.C. Cir. 2006), the D.C. Circuit evaluated the standing of a white male applicant for a job at the United States Department of Housing and Urban Development to challenge the Department's race-conscious hiring policies that gave preference to minorities and to women. The Court applied *Jacksonville* and held that the plaintiff possessed standing, but indicated that *Jacksonville* was a specially-created exception for challenges to affirmative action programs: "[T]he Supreme Court has created an exception to this general rule for plaintiffs bringing facial challenges to race-conscious set-aside programs." *Worth*, 451 F.3d at 858 (*citing Jacksonville*, 508 U.S. at 658.) The Court also suggested that *Jacksonville* applied only to challenges to racial preferences in programs involving the *competitive* allocation of benefits: "Because job applicants, like contractors, must compete to obtain a

benefit, they too have standing to challenge statutory set aside programs." *Worth*, at 859.

However, some intra-circuit disagreement seems to exist about *Jacksonville* in the D.C. Circuit. In *Settles v. United States Parole Commission*, 429 F.3d 1098 (D.C. Cir. 2005), the Court held that *Jacksonville* was *not* limited to "instances where individuals in one group are competing with individuals in another group for a benefit." *Id.* at 1102. In that case, the benefit at issue was "receiving parole." *Id.*

In sum, there is a great deal of uncertainty between and within the various circuits as to the scope of the *Jacksonville* precedent. Litigants' cases are being dismissed for lack of standing in one circuit, when the same cases would yield the opposite conclusion in another circuit. The protections of the Equal Protection Clause are too important to be subject to arbitrary differences between circuits when determining who has access to the Courts of the United States. By granting the writ and reviewing this case, this Court could provide much-needed uniformity in the application of the *Jacksonville* principle.

B. The Tenth Circuit's Holding Leads to Absurd Results

The narrowing of the *Jacksonville* holding by the Tenth Circuit also leads to absurd results. It creates an untenable conundrum with respect to any benefit that is offered *only* to a group defined by a suspect classification. For example, if the Court below were correct, a non-white student would lack standing to

challenge a racially-discriminatory law providing a new tuition discount only to white students at a state university on equal protection grounds. If a court invalidated the law, no-one would be able to obtain the tuition discounts, including the non-white plaintiffs. Under the logic of the Court of Appeals, non-white plaintiffs would have no standing to bring an Equal Protection challenge, because they didn't receive the benefit before the enactment of the law; and they wouldn't receive the benefit after invalidation of the law. Indeed, no one would have standing to challenge this obviously unconstitutional law. Consequently, the Court of Appeals has created a problematic gap in Equal Protection Clause jurisprudence, one that other Circuits may enlarge to if they were to repeat the Tenth Circuit's error. It is therefore essential that this Court grant the writ of certiorari to correct this error and to bring uniformity to Circuit Courts' application of *Jacksonville*.

III. Allowing the Tenth Circuit's Decision to Stand Will Defeat the Intent of Congress and Will Effectively Render 8 U.S.C. § 1623 a Dead Letter

It is important to recognize that this case seeks to vindicate the substantive right created by 8 U.S.C. § 1623 exactly as the drafters of that federal statute intended. The Senate and House authors of 8 U.S.C. § 1623 intended that its terms would be enforceable through claims brought by nonresident U.S. citizens attending the same universities as the illegal aliens receiving in-state tuition rates. U.S. Representative Lamar Smith and former U.S. Senator Alan Simpson were the original sponsors of Section 1623 in the

House and Senate, respectively. In an amicus brief submitted to the Court of Appeals, Representative Smith and Senator Simpson affirmed that it was their intent in introducing this federal legislation to allow U.S. citizen students to sue to realize their rights to any educational benefits offered to illegal aliens. Smith and Simpson Amic. Br. 5, Appendix E, p. 103a.

The intent of the Congress was equally clear, with respect to the substantive meaning of 8 U.S.C. § 1623. Every statement on the record during the congressional deliberations prior to its enactment makes clear that Congress intended states to be prevented from granting the benefit of in-state tuition rates to illegal aliens unless the states were willing to grant the same tuition benefit to all U.S. citizens. Senator Simpson stated: "Without the prohibition on States treating illegal aliens more favorably than U.S. citizens, States will be able to make illegals eligible for reduced in-State tuition at taxpayer-funded State colleges." 142 Cong Rec S11508 (1996), Transcript Vol. VI, p. 1425. Plainly, K.S.A. 76-731a defies the statutory protection that Members of Congress thought they were providing.

Statements from a bill's proponents must be weighed heavily in any judicial determination of congressional intent: "To be sure, we gain only limited insight into congressional intent from statements made during floor debate and from conference reports, but we have always relied heavily upon authoritative statements by proponents of bills in our search for the meaning of legislation." *INS v. Phinpathya*, 464 U.S. 183, 204 (1984) (*citing Lewis v. United States*, 445 U.S.

55, 63 (1980); *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976)).

If the decision of the Court of Appeals is allowed to stand, the intent of the authors of 8 U.S.C. § 1623 will be defeated entirely. Not only will their anticipated mechanism of enforcement be eliminated, the substantive protections of the law will be effectively removed. And an Act of Congress that was intended to prohibit states from undermining the enforcement of federal immigration laws will be rendered a dead letter because no-one will possess standing to bring a preemption claim. Consequently, the rule of law will suffer on multiple levels.

CONCLUSION

If the petition is not granted, the circuit split created by the Tenth Circuit will continue with respect to its erroneous merger of standing and private right of action doctrines, and the defeat of congressional intent regarding 8 U.S.C. § 1623 will effectively render that provision of law unenforceable in court. In addition, confusion among the Circuits will persist regarding the scope of the *Jacksonville* precedent. Consequently, litigants' access to the Courts of the United States when bringing challenges under the Equal Protection Clause will continue to vary arbitrarily, depending on the Circuit in which the case is filed. For the above and foregoing reasons, petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 05-3309

[Filed August 30, 2007]

KRISTEN DAY; SONNA L. DAY; CODY ECHOLS; DAVID C. EICHMAN; BRANDI P. GILLETTE; CHRISTOPHER J. HEATH; AMY E. HUGHES; JERALDYN L. HUGHES; KENNETH H. HUGHES; NICOLE C. KEENE; HEIDI L. LANDHERR; ROBERTA K. MACGREGOR; ROBERT R. MANZEL; KARLA A. MANZEL; KAYLA L. MANZEL; JONATHAN D. MILLER; MARY L. MILLER; LASHONDA M. MONTGOMERY; MICHELLE PRAHL; KYLE ROHDE; MARCY R. RUTAN; JOSHUA B. SHEADE; JAMIE WHITTENBERG; LINDSEY D. WHITTINGTON,	)
Plaintiffs-Appellants,	)
v.	)
RICHARD BOND, Chairman of the Kansas Board of Regents; DONNA L. SHANK; JANICE DEBAUGE; WILLIAM R.	)

DOCKING; LEWIS L. FERGUSON; FRANK GAINES; NELSON GALLE; JAMES GRIER, III; DERYL W. WYNN, Members of the Kansas Board of Regents in their official capacities; CINDY DERRITT, Registrar of the University of Kansas in her official capacity; MONTY NIELSON, Registrar of Kansas State University in his official capacity; LEHYMANN F. ROBINSON, Registrar of Emporia State University in his official capacity,

Defendants-Appellees,

KANSAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS; THE HISPANIC AMERICAN LEADERSHIP ORGANIZATION, Kansas State Chapter; A. DOE; J. DOE; L. DOE,

Defendants-Intervenors-Appellees,

KATHLEEN SEBELIUS, personally and in her official capacity as Governor of Kansas,

Defendant.

HONORABLE ALAN K. SIMPSON; HONORABLE LAMAR S. SMITH; WASHINGTON LEGAL FOUNDATION; THOMAS J. BRENNAN; ZAN BRENNAN; BRIGETTE BRENNAN; ALLIED EDUCATIONAL FOUNDATION;

KANSAS ASSOCIATION OF SCHOOL BOARD, INC.,

Amici Curiae.

Appeal from the United States District Court for the District of Kansas (D.C. No. 04-CV-4085-RDR)

Kris W. Kobach, University of Missouri-Kansas City School of Law, Kansas City, Missouri (Michael M. Hethmon, Federation for American Immigration Reform, Washington, District of Columbia, with him on the briefs), for Plaintiffs- Appellants.

David Davies, Deputy Attorney General; William Scott Hesse, Assistant Attorney General, State of Kansas, Topeka, Kansas; Michael F. Delaney (Clayton L. Barker and Michael C. Leitch, with him on the briefs), Spencer, Fane, Britt & Browne, Kansas City, Missouri, for Defendants-Appellees.

J. Eugene Balloun, Shook, Hardy & Bacon L.L.P., Overland Park, Kansas; Lee Gelernt and Lucas Guttentag, American Civil Liberties Union Foundation, New York, New York; Linton Joaquin and Tanya Broder, National Immigration Law Center, Los Angeles, California; Peter D. Roos, Multicultural Education, Training and Advocacy, Inc., Oakland, California, for Defendants-Intervenors-Appellees.

William Perry Pendley and Ronald Walter Opsahl, Mountain States Legal Foundation, Lakewood, Colorado, filed an amicus curiae brief in support of

Plaintiffs-Appellants on behalf of Amici Curiae the Honorable Alan K. Simpson and the Honorable Lamar S. Smith.

Daniel J. Popeo and Richard A. Samp, Washington Legal Foundation, Washington, District of Columbia, filed an amicus curiae brief in support of Plaintiffs-Appellants on behalf of Amici Curiae Washington Legal Foundation, Thomas J. Brennan, Zan Brennan, Brigette Brennan, and Allied Educational Foundation.

David C. Cunningham, Topeka, Kansas, filed an amicus curiae brief in support of Defendants-Intervenors-Appellees on behalf of Amicus Curiae Kansas Association of School Board, Inc.

Before **LUCERO**, Circuit Judge, and **McWILLIAMS** and **EBEL**, Senior Circuit Judges.

EBEL, Senior Circuit Judge.

Kristen Day, a group of her fellow students at state universities in Kansas, and several of their parents (collectively, the "Plaintiffs") seek to overturn a provision of Kansas law that permits certain illegal aliens to qualify for in-state tuition rates. Day and the other Plaintiffs contend that Kansas Statutes § 76-731a unlawfully discriminates against U.S. citizens who are not Kansas residents in violation of the Equal Protection Clause of the Fourteenth Amendment and is preempted by 8 U.S.C. § 1623, a provision of federal immigration law. The district court below held that the Plaintiffs lacked standing to bring some of their claims and had no cause of action to bring others. Accordingly, it granted summary judgment against

them. The Plaintiffs now appeal. We conclude that the Plaintiffs lack standing to bring their equal protection claim and that they lack a cause of action for their remaining statutory preemption claim; thus, we AFFIRM.

BACKGROUND

On May 20, 2004, Kansas Governor Kathleen Sebelius signed into law Kansas House Bill 2145, effective July 1, 2004. H.B. 2145, now codified at K.S.A. § 76-731a, provided that certain nonresidents were deemed residents for tuition purposes.[1] Pursuant

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[1] Section 76-731a, captioned "Certain persons without lawful immigration status deemed residents for purpose of tuition and fees," provides, in relevant part:

> (a) Any individual who is enrolled or has been accepted for admission at a postsecondary educational institution as a postsecondary student shall be deemed to be a resident of Kansas for the purpose of tuition and fees for attendance at such postsecondary educational institution.
>
> (b) As used in this section: . . .
>
> (2) 'individual' means a person who
>
> (A) has attended an accredited Kansas high school for three or more years,
>
> (B) has either graduated from an accredited Kansas high school or has earned a general educational development (GED) certificate issued within Kansas, regardless of whether the person is or is not a citizen of the United States of America; and

to its terms, at least six Kansas students who were undocumented, illegal aliens and who did not otherwise qualify for Kansas resident tuition, paid resident tuition to attend the University of Kansas ("KU"), Kansas State University ("KSU"), and Emporia State University ("ESU") in the 2004-05 school year.

The student Plaintiffs, who similarly were not legal residents of Kansas and did not qualify for resident tuition under § 76-731a or any other Kansas statute,

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(C) in the case of a person without lawful immigration status, has filed with the postsecondary educational institution an affidavit stating that the person or the person's parents have filed an application to legalize such person's immigration status, or such person will file such an application as soon as such person is eligible to do so or, in the case of a person with a legal, nonpermanent immigration status, has filed with the postsecondary educational institution an affidavit stating that such person has filed an application to begin the process for citizenship of the United States or will file such application as soon as such person is eligible to do so.

(c) The provisions of this section shall not apply to any individual who:

(1) Has a valid student visa; or

(2) at the time of enrollment, is eligible to enroll in a public postsecondary educational institution located in another state upon payment of fees and tuition required of residents of such state.

filed suit to prevent implementation of § 76-731a. In a seven-count complaint, they alleged that § 76-731a violates various provisions of federal immigration law and the comprehensive regulatory scheme governing immigration; that it is preempted by Congress's occupation of the immigration field; that it impermissibly infringes upon powers reserved to the federal government; and that it violates the Equal Protection Clause by discriminating in favor of illegal aliens, as against nonresident U.S. citizens, in the provision of educational benefits. Of relevance for purposes of the issues appealed are Counts 2 and 7 of the Plaintiffs' Amended Complaint. Count 2 asserted that "implementation of [§ 76-731a] by Kansas postsecondary educational institutions under the direction of the Defendants violates . . . 8 U.S.C. § 1623."[2] Count 7 alleged that implementation of § 76-731a would violate the Plaintiffs' equal protection rights "by denying [the] Plaintiffs eligibility to apply for and receive similar postsecondary educational benefits on an equal basis." The Defendants to the suit

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[2] Section 1623, captioned "Limitation on eligibility for preferential treatment of aliens not lawfully present on basis of residence for higher education benefits," provides in relevant part that

> [n]otwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

included Governor Sebelius,[3] the members of the Board of Regents, and the registrars of KU, KSU, and ESU (collectively, the "Defendants"). In addition, the Hispanic American Leadership Organization, Kansas State Chapter, and the Kansas League of United Latin American Citizens (the "Intervenors") were allowed to intervene as defendants.

The district court dismissed all of the Plaintiffs' claims on motions by the Defendants and Intervenors, which the court converted to motions for summary judgment. The court held the Plaintiffs lacked standing to bring their several claims that § 76-731a was preempted by provisions of federal law, including 8 U.S.C. § 1623. To the extent that the Plaintiffs sought to enforce substantive rights conferred by 8 U.S.C. § 1623, the district court found they had standing but dismissed this claim for lack of a private right of action to enforce the statute's terms. The court then dismissed the Plaintiffs' equal protection claim for lack of standing. This appeal timely followed.

DISCUSSION

We review *de novo* a district court's order granting summary judgment, applying the same standard employed by the district court. *Alexander v. Oklahoma*, 382 F.3d 1206, 1215 (10th Cir. 2004). Summary judgment is appropriate only "if the

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[3] The district court dismissed Governor Sebelius as a defendant because she had no involvement with the enforcement of § 76-731a and thus was not a proper defendant in the suit. The Plaintiffs do not appeal this ruling.

pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Simms v. Oklahoma ex rel. Dep't of Mental Health & Substance Abuse Servs.*, 165 F.3d 1321, 1326 (10th Cir. 1999).

We likewise review *de novo* "questions of subject matter jurisdiction, including whether a plaintiff has standing to sue." *Schutz v. Thorne*, 415 F.3d 1128, 1132 (10th Cir. 2005), *cert. denied*, 546 U.S. 1174 (2006) (quoting *Wilson v. Glenwood Intermountain Props.*, 98 F.3d 590, 593 (10th Cir. 1996)). To prevail at summary judgment on standing grounds, the defendant must show that the record is devoid of evidence raising a genuine issue of material fact that would support the plaintiff's ultimate burden of proving standing. *See Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1280 (10th Cir. 2002) (requiring that a party prevailing at summary judgment on standing grounds "establish that there exists no genuine issue of material fact as to justiciability"); *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329 (1999). We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

The elements of the Article III standing inquiry are well-known. A plaintiff invoking the jurisdiction of a federal court bears the burden of showing:

> (1) injury in fact, by which we mean an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to the challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.

Ne. Fla. Chapter of Assoc. Gen. Contractors v. City of Jacksonville, 508 U.S. 656, 663 (1993) (quotations, citations, and punctuation omitted). "[E]ach [of these] element[s] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). "In response to a summary judgment motion," the plaintiff cannot "rest on . . . 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts'" regarding the elements of standing. *Id.* (quoting FED. R. CIV. P. 56(e)).

I. Equal Protection Claim (Count 7)

The Plaintiffs make four arguments that the operation of § 76-731a violates their rights under the Equal Protection Clause of the Fourteenth Amendment and thereby created sufficient injury to

support constitutional standing. In their Amended Complaint, their primary contended injury was the fiscal differential between nonresident tuition rates that the Plaintiffs paid and the resident tuition rate paid by the illegal aliens qualifying under § 76-731a. More specifically on appeal, the Plaintiffs articulate their injuries as follows:

> (1) The denial of equal treatment, in and of itself, caused by barriers in K.S.A. 76-731a making it impossible for nonresident U.S. citizens to obtain the benefits extended by the statute.
> (2) The increased tuition faced by [the Plaintiffs], as the burden of subsidizing illegal alien beneficiaries of K.S.A. 76-731a is passed along to other students through tuition hikes.
> (3) The injury that results from competition for scarce tuition resources.
> (4) The extra tuition paid by nonresident [Plaintiffs] during the 2004-2005 academic year over the in-state tuition paid by nonresident illegal aliens, as a consequence of the discriminatory operation of K.S.A. 76-731a.

Each of these four formulations of the Plaintiffs' claimed equal protection injuries fails to satisfy the requisite standing criteria. As to the second and third of these alleged injuries, the Plaintiffs have not demonstrated that they have suffered a concrete and nonspeculative injury based on the discriminatory treatment provided by § 76-731a. As to the first and fourth of these alleged injuries, the Plaintiffs cannot show that their asserted injury was proximately caused by § 76-731a, nor that any injury could be

redressed by a decision in their favor. We must, therefore, dismiss their equal protection claim for lack of standing.

A. Injury

Injury in fact that supports standing to bring a claim under the Equal Protection Clause need not be economic in nature. Indeed, it is often the case that "the right asserted . . . is the right to receive 'benefits distributed according to classifications which do not without sufficient justification differentiate among covered applicants solely on the basis of [impermissible criteria],' and not a substantive right to any particular amount of benefits." *Heckler v. Mathews*, 465 U.S. 728, 737 (1984) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 647 (1975)) (citation and alterations omitted); *accord Cunico v. Pueblo Sch. Dist. No. 60*, 917 F.2d 431, 441 (10th Cir. 1990). In such a case, injury in fact is simply "the existence of a government-erected 'barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group.'" *Buchwald v. Univ. of N.M. Sch. of Med.*, 159 F.3d 487, 493 (10th Cir. 1998) (quoting *City of Jacksonville*, 508 U.S. at 666). A plaintiff need not show that he or she would necessarily have received the benefit but for the operation of the policy; rather, "the injury is the imposition of the barrier itself." *Id.* However, the plaintiff still must show that the challenged discriminatory criterion was, in fact, the barrier that

disadvantaged his or her ability to obtain benefits.[4] *See id.*

Neither the Plaintiffs' second nor third theories of injury under their equal protection claim is sufficiently concrete and nonspeculative to support standing. The second theory of injury, that the Plaintiffs shoulder the financial burden of increased tuition by subsidizing illegal aliens, requires a showing of a causal connection between the tuition subsidy for illegal aliens and nonresident tuition. Yet, other than the Plaintiffs' citations to news and opinion articles containing commonplace and nonspecific observations that nonresident tuition dollars often subsidize the cost of residents' education at public universities nationwide, the record before us is devoid of evidence of any causal relationship between the tuition cost imposed on Kansas' public universities by § 76-731a and nonresident tuition rates imposed on the Plaintiffs. Accordingly, the Plaintiffs have failed to carry their burden of demonstrating this claimed injury is "not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (quotation omitted).

Similarly, the third theory of injury — "competition for scarce tuition resources" on an unequal footing — requires some proof of the existence of competition

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[4] The Plaintiffs' first and fourth theories of injury under their equal protection claim, evaluated under these standards, sufficiently allege cognizable injuries in fact to support the Plaintiffs' standing. However, as addressed in Part I.B of this opinion, *infra*, those theories falter on the causation and redressability requirements of Article III standing.

between the Plaintiffs and illegal aliens over a limited pool of funds employed for tuition subsidies. However, our statement in *Buchwald* that "the injury is the imposition of the barrier itself" in cases of competition on an uneven field, 159 F.3d at 493, does not grant license to assert injury upon an allegation of competition that itself may be merely hypothetical, *see Lujan*, 504 U.S. at 560. Here, the Plaintiffs' failure to adduce any evidence in support of their theory of injury would force us into speculating on the inner workings of university and state budgetary mechanisms to discern a genuine issue of material fact over the existence *vel non* of this injury. The record is devoid of any evidence that Kansas public universities' budgets are a zero-sum game or that the higher nonresident tuition rates that illegal aliens would pay in the absence of § 76-731a would even be available for redistribution to tuition reductions or educational services benefitting nonresident students like the Plaintiffs. Thus, the Plaintiffs have provided no basis upon which we may conclude that this third claimed injury is anything other than speculation.

B. Causation and Redressability

The Plaintiffs' first and fourth theories of injury under their equal protection claim are sufficiently concrete, particularized, and nonspeculative to support injury. They nevertheless founder on the Plaintiffs' inability to establish either injuries caused by the allegedly unlawful discrimination the Plaintiffs decry or that any such injuries would be redressed by a favorable decision from this court. As we have consistently held, "[d]iscrimination cannot be the cause of injury to an applicant who could not have obtained

the benefit even in the absence of the discrimination," and such an applicant lacks the requisite personal stake in the outcome because he would still not qualify for the benefit following a decision in his favor.[5] *Wilson*, 98 F.3d at 594; *see Fuller v. Norton*, 86 F.3d 5 1016, 1027 (10th Cir. 1996).

In *Wilson*, we addressed a Fair Housing Act challenge to, *inter alia*, several landlords' practice of segregating by gender housing reserved for students of Brigham Young University (BYU). 98 F.3d at 592. Because suit was brought by nonstudents, however, we held they lacked standing under *City of Jacksonville*. We determined that

> a person who fails to satisfy lawful, nondiscriminatory requirements or qualifications for the benefit lacks standing to raise claims of discrimination in the denial of the benefit. The discrimination does not deprive

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[5] Contrary to the Plaintiffs' arguments, *City of Jacksonville* does not mandate a different conclusion. The Supreme Court held in that case that "a plaintiff challenging under the Equal Protection Clause a legal barrier to compete for a government contract, need not show that in the absence of the challenged provision he would have been awarded the contract, only that he would have qualified for the *opportunity* to bid for it." *Fuller*, 86 F.3d at 1027 n.10 (citing *City of Jacksonville*, 508 U.S. at 665-67). As we noted in *Fuller*, this "equal footing" definition of injury in the context of a competition for benefits does not contradict the principle that a plaintiff disqualified entirely from competing for a benefit by nondiscriminatory eligibility criteria lacks standing. *Id.* This principle is equally applicable to competitive and noncompetitive benefit programs.

> the person of the ability to compete because he or she is disqualified from competing for other, legitimate reasons. A favorable decision on the discrimination claim could not redress the injury because the person would still be disqualified from competing.

Id. at 593. The *Wilson* plaintiffs, who were nonstudents, could not show causation because "the ownership and/or operation of gender-segregated apartments reserved solely for BYU students could not have caused [the] plaintiffs to lose the opportunity to rent the apartments," and a decision in their favor would not redress their claimed injury "because they would still not be qualified to rent apartments reserved for BYU students." *Id.* at 594.

While it is indisputable that standing to assert an equal protection claim does not require that a plaintiff show that he *would* have obtained the benefit but for the discriminatory effects of a government-erected barrier, the plaintiff must nevertheless demonstrate that he *could* have obtained the benefit. *See City of Jacksonville*, 508 U.S. at 666. If, as in *Wilson*, a plaintiff cannot do so because nondiscriminatory classifications would disqualify him from eligibility for the benefit even absent the challenged discriminatory classification, he cannot show injury caused by the discrimination, nor can he show injury that would be redressed by a decision in his favor; he therefore lacks standing to bring his claim. 98 F.3d at 593-94. Similarly, in a case concerning the denial of an equal opportunity to compete, such as *Schutz*, *City of Jacksonville*, or *Buchwald*, the plaintiff must show he is not disqualified from competing because of

nondiscriminatory eligibility criteria and that the allegedly discriminatory eligibility criteria impaired his opportunity successfully to compete for the benefits offered. *See Schutz*, 415 F.3d at 1133-34; *Buchwald*, 159 F.3d at 493.

None of these Plaintiffs would be eligible to pay resident tuition under § 76-731a even if the allegedly discriminatory test of § 76-731a(c)(2) favoring illegal aliens were stricken, because none attended Kansas high schools for at least three years and either graduated from a Kansas high school or received a Kansas GED certificate. K.S.A. § 76-731a(b)(2)(B), (C). This is a nondiscriminatory prerequisite for benefits under § 76-731a, regardless of the citizenship of the students. The Plaintiffs' first and fourth theories of injury, under which they seek equal treatment with illegal aliens under § 76-731a, were therefore not caused by the statute's allegedly discriminatory operation, nor would these injuries be redressed by a decision striking down the discriminatory classification embedded in its provisions. *See Wilson*, 98 F.3d at 593-94. The Plaintiffs thus do not have standing to challenge § 76-731a on equal protection grounds, and we affirm the dismissal of their claim on that basis.

II. Preemption Claim (Count 2)

In addition to arguing that K.S.A. § 76-731a violates the Equal Protection Clause by discriminating on the basis of alienage, the Plaintiffs contend that

§ 76-731a is preempted by 8 U.S.C. § 1623.[6] The district court likewise dismissed this claim for lack of standing. Although the Plaintiffs did not initially contest the district court's ruling on appeal by addressing their standing to assert a preemption claim, we exercise our discretion to consider their arguments nonetheless. The only form of injury that the Plaintiffs assert in support of their standing to make this preemption claim is the invasion of a putative statutory right conferred on them by § 1623. However, we conclude that § 1623 does not vest any federal right in nonresident citizen students like the Plaintiffs to assert preemption. We therefore conclude that the Plaintiffs cannot claim such a right as the basis of an injury supporting standing. Thus, they lack standing to pursue their preemption claim, and we affirm its dismissal.

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[6] In their Amended Complaint, the Plaintiffs denominated Count 2 as "Violation of 8 U.S.C. [§] 1623" and proceed to enumerate the ways in which K.S.A. § 76-731a "contravenes 8 U.S.C. [§] 1623." The district court separated this claim for analytical purposes into (1) a claim purporting to enforce directly substantive personal rights conferred by § 1623 and (2) a claim seeking injunctive relief against § 76-731a based upon the purported preemptive effect of § 1623. It dismissed the former claim for failure to state a claim, in that § 1623 provided no private right of action, and the latter claim for lack of standing. The analytic distinction between these two claims is a diaphanous one, and it might well dissolve upon close inspection. We need not decide the issue, however, as the Plaintiffs argue on appeal only that "enforcement" of § 1623 grants it the appropriate preemptive effect under the Supremacy Clause and the Plaintiffs concede they seek only invalidation of § 76-731a as relief. Accordingly, we consider their claim under Count 2 only as one of preemption.

The Plaintiffs have disclaimed on appeal any injury other than an invasion of the legal right that they assert § 1623 has vested in them and any remedy other than the presumptive annulment of § 76-731a.[7] It is long settled in the law that "[t]he actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing . . . .'" *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373 (1982) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975); alteration in original). Yet absent a statutory right vested in these particular plaintiffs by virtue of § 1623, the Plaintiffs would retain only a generalized interest in the Defendants' compliance with the law. *See Lujan*, 504 U.S. at 573-74.

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[7] The Plaintiffs did not abandon their assertion of standing by failing to raise it in their initial appellate brief. They did directly raise the essence of the issue in their initial brief — i.e., whether they have a legally cognizable right under § 1623. Further, we have the benefit of the Defendants' arguments on the threshold issue of standing presented in their response brief, and consideration of the issue thus would not prejudice them. The question was presented below, and both sides have had the opportunity to develop fully their legal and factual arguments. And though standing is not always a pure question of law, the issue here is one for which we have a sufficiently developed record, given that the same question of standing arises in the context of the Plaintiffs' equal protection claim. *Cf. United Transp. Union v. Dole*, 797 F.2d 823, 827-28 (10th Cir. 1986). Thus, although the Plaintiffs "should have developed the issue in a more thorough and in-depth fashion in [their initial] appellate brief," *id.* at 827, we are not foreclosed from considering the issue by the concerns which normally prevent us from addressing a question abandoned on appeal.

To have standing, then, the Plaintiffs must possess a private, individualized right conferred by § 1623, and the existence *vel non* of a private right under § 1623 becomes the critical inquiry. That question is as yet undecided in this or any other circuit. However, our precedent suggests that we may be required to defer to the Plaintiffs' assertion that such a right exists for purposes of evaluating standing, so as not to confuse standing with the merits. Accordingly, we first consider whether, at this stage of the litigation, we must accept, for standing purposes, the Plaintiffs' legal assertion that they have a private right protected by § 1623.

A. Whether we are required to accept the Plaintiffs' assertion of a private, enforceable right under § 1623 for purposes of our review of standing.

We addressed the propriety of testing the merits of plaintiffs' claims for purposes of evaluating standing in *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006) (en banc), *cert. denied*, 127 S. Ct. 1254 (2007). In *Walker*, groups desiring to mount a ballot initiative alleged that a Utah state constitutional provision imposing a supermajority voting requirement for initiatives concerning wildlife management violated their First Amendment right of free speech. *Id.* at 1085. Specifically, the plaintiffs alleged that the constitutional provision had "a chilling effect on [the plaintiffs'] speech in support of wildlife initiatives in Utah." *Id.* at 1088. The plaintiffs contended that this alleged First Amendment injury also established their standing to assert that claim. On a motion to dismiss, the defendants argued the

plaintiffs were not injured by the state constitutional provision and thus lacked standing because their claim on the merits was incorrect. Specifically, the defendants argued "that the First Amendment does not guarantee political success or imply a right to be heard and supported, and that the supermajority requirement place[d] no direct restriction on the speech of anyone and [left] the [p]laintiffs free to engage in full and robust political speech." *Id.* at 1092.

We declined to consider these merits arguments in the context of our standing review, not because they were necessarily incorrect, but because the *Walker* defendants had "confuse[d] standing with the merits." *Id.* "For purposes of standing," we noted, "the question cannot be whether the Constitution, properly interpreted, extends protection to the plaintiff's asserted right or interest," because that would be a determination of the merits of the plaintiffs' claim under the guise of an evaluation of their standing. *Id.* The merits issue was whether the First Amendment restricted states' abilities to impose supermajority requirements for certain initiatives. The answer to that question would necessarily resolve the standing issue, since the plaintiffs alleged an interest in pursuing an initiative covered by the challenged supermajority requirement. If the First Amendment had the scope claimed by the plaintiffs, then the plaintiffs' First Amendment rights would necessarily be violated. And it is axiomatic that a plaintiff has standing to assert that his or her First Amendment rights have been violated. Critically, however, in *Walker*, the plaintiffs' asserted injury and their claimed constitutional violation were one and the same. Accordingly, we refused to consider, at the

threshold stage of determining standing, whether the First Amendment did or did not restrict supermajority requirements for certain initiative efforts. *Id.* at 1093. That question must be reserved for the merits analysis. *See id.* at 1098-1105.

Nevertheless, we did note that "the term 'legally protected interest' must do some work in the standing analysis . . . [and] has independent force and meaning without any need to open the door to merits considerations at the jurisdictional stage." *Id.* at 1093. But we did not explain what that independent force and meaning are, other than to offer a nonexhaustive list of situations in which an asserted "legally protected interest" is not recognized. *See id.* (noting that asserted interests in continued criminal activity or in prosecution of another are not legally protected, nor is a "claimed legal right [that is] so preposterous as to be legally frivolous").

Practically speaking, *Walker* mandates that we assume, during the evaluation of the plaintiff's standing, that the plaintiff will prevail on his merits argument — that is, that the defendant has violated the law. *See id.* ("For purposes of standing, we must assume the [p]laintiffs' claim has legal validity."). But there is still work to be done by the standing requirement, and Supreme Court precedent bars us from assuming jurisdiction based upon a hypothetical legal injury. *See Lujan*, 504 U.S. at 560. While *Walker* addressed an instance in which the merits of the plaintiffs' claims mirrored the alleged standing injury, that is not always the case. There are cases, such as the one before us here, where the alleged injury upon which the plaintiffs rely to establish standing is

distinct from the merits of claims they assert. *E.g.*, *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172-73 (10th Cir. 2006) ("[A] plaintiff can have standing despite losing on the merits — that is, even though the [asserted legally protected] interest would not be protected by the law in that case."); *see also Duke Power Co. v. Carolina Envt'l Study Group, Inc.*, 438 U.S. 59, 78-79 (1978).

Here, the issue of standing is not necessarily determined by the merits determination. The merits issue is whether K.S.A. § 76-731a is preempted by 8 U.S.C. § 1623. The standing question is whether § 1623 creates a private cause of action. Each of these issues is separate and independent, and we may determine whether the Plaintiffs here have standing to assert a private cause of action under § 1623 without reaching the merits of whether § 1623 preempts § 76-731a. *See DH2, Inc. v. U.S. Securities & Exchange Comm'n*, 422 F.3d 591, 592 (7th Cir. 2005) (determining that the plaintiff lacked standing because its injury was speculative, without addressing the merits of the underlying claim).

Under these conditions, *Walker* simply does not apply. Accordingly, we now turn to the pure standing question whether § 1623 confers a private cause of action upon the Plaintiffs.

B. Whether § 1623 confers a private cause of action on these plaintiffs.

The question whether a federal statute confers a private cause of action under 42 U.S.C. § 1983 — and concomitantly an injury for purposes of evaluating

standing — has been treated extensively in recent years. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 282-86 (2002); *Alexander v. Sandoval*, 532 U.S. 275, 286-93 (2001); *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997).

The Supreme Court in *Gonzaga University* analyzed the Family Educational Rights and Privacy Act (FERPA) to determine whether it conveyed a personal right to nondisclosure of educational records. The statutory text at issue there provided that

> [n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein . . .) of students without the written consent of their parents to any individual, agency, or organization.

Gonzaga Univ., 536 U.S. at 279 (quoting 20 U.S.C. § 1232g(b)(1)). "[T]here is no question," the Court determined, "that FERPA's nondisclosure provisions fail to confer enforceable rights." *Id.* at 287. The text lacked critical "rights-creating" language and addressed itself to the Secretary of Education, not the individuals on whom it purportedly conferred enforceable rights. *Id.* It employed an "aggregate focus" on "institutional policy and practice, not individual instances of disclosure," and it did not express concern "with whether the needs of any particular person ha[d] been satisfied." *Id.* at 288 (quotations omitted). Further, Congress had mandated a federal enforcement mechanism, "expressly

authoriz[ing] the Secretary of Education to deal with violations of the Act" by establishing an administrative review board. *Id.* at 289 (citing 20 U.S.C. § 1232g(f)) (quotation, emphasis omitted). The Court concluded that Congress had not created personal rights under FERPA that were enforceable via § 1983. *Id.* at 290.

The statute at issue in this case, 8 U.S.C. § 1623, has significant aspects of text and structure that foreclose the Plaintiffs' argument that it vests in them private rights. Its text "entirely lack[s] the sort of 'rights-creating' language critical to showing the requisite congressional intent to create new rights." *Gonzaga Univ.*, 536 U.S. at 287. Section 1623 does not provide that "No nonresident citizen shall be denied a benefit" afforded to an illegal alien, but rather imposes a limit on the authority of postsecondary educational institutions. *Cf. id.* (quoting the rights-creating language of Titles VI and IX).

Moreover, § 1623 addresses itself to the institutions affected and their authority to provide benefits to illegal aliens, not to the class of nonresident citizens who incidentally benefit from its provisions. "This focus is [a step] removed from the interests of individual students and parents and clearly does not confer the sort of '*individual* entitlement' that is enforceable under § 1983" or an implied private right of action. *Gonzaga Univ.*, 536 U.S. at 287 (quoting *Blessing*, 520 U.S. at 343). Section 1623, like FERPA, speaks "in terms of institutional policy and practice" and employs an "aggregate" focus which "cannot 'give rise to individual rights.'" *Id.* at 288 (quoting *Blessing*, 520 U.S. at 343-44).

Further, we observe that 8 U.S.C. § 1103(a)(1) provides in relevant part that "[t]he Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens." We do not conclude that private rights are not conferred under other provisions of the immigration code. However, the language of § 1623, in combination with § 1103(a)(1), provides further evidence that federal, not private, enforcement of § 1623 was contemplated by Congress.

Accordingly, we hold that the Plaintiffs held no legal right under § 1623 to assert preemption that was invaded by the implementation of K.S.A. § 76-731a, and the Plaintiffs' claim of such an individual legal right under § 1623 to support standing is legally invalid. Thus, the Plaintiffs lack standing to assert a preemption claim based on such a supposed individual right.

CONCLUSION

The Plaintiffs' claim that K.S.A. § 76-731a violates the equal protection of the laws guaranteed under the Fourteenth Amendment fails for lack of standing. The Plaintiffs have failed to bring forward evidence supporting their theories of injury based upon the subsidization of resident tuition for illegal aliens. Thus, these theories of injury are too conjectural and speculative to support standing. And because the Plaintiffs cannot show that they could have qualified for the benefits of § 76-731a even were the allegedly discriminatory provision excised, they are unable to show that their other theories of injury are traceable

to the discriminatory conduct alleged or that the injuries would be redressed by a decision in the Plaintiffs' favor. They thus lack standing to bring their equal protection claim.

The Plaintiffs similarly lack standing to raise their preemption claim under 8 U.S.C. § 1623. The text and structure of § 1623 do not manifest a congressional intent to create private rights, and the Plaintiffs thus have not claimed any cognizable and individualized injury stemming from the implementation of K.S.A. § 76-731a.

Because the Plaintiffs lack standing to bring either of their claims, we lack jurisdiction to hear them. We must therefore AFFIRM the dismissal of both claims.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 04-4085-RDR

[Filed July 5, 2005]

KRISTEN DAY, et al.,)
)
Plaintiffs,)
)
vs.)
)
KATHLEEN SEBELIUS,)
personally and in her)
official capacity as)
Governor of Kansas, et al.,)
)
Defendants.)
)

MEMORANDUM AND ORDER

This is an action brought by the plaintiffs challenging K.S.A. 76 731a (formerly known as House Bill 2145), which became law on July 1, 2004. Plaintiffs contend that K.S.A. 76-731a unlawfully and unfairly allows undocumented or illegal aliens to attend Kansas universities and pay resident or in-

state tuition.[1] Plaintiffs are either students at Kansas regents schools or parents of those students. The students are United States citizens who have been classified as non-residents of Kansas for tuition purposes at their respective schools. The defendants are the Governor of Kansas, the members of the Board of Regents, and the registrars of the University of Kansas, Kansas State University and Emporia State University. Two groups, Kansas League of United Latin American Citizens (KLULAC) and Hispanic American Leadership Organization, Kansas State Chapter (HALO), have been allowed to intervene as defendants in this action.

In their complaint, plaintiffs object to the ability of undocumented or illegal aliens[2] to avail themselves of K.S.A. 76-731a. Plaintiffs seek injunctive relief and declaratory relief. They seek injunctive relief enjoining

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[1] The statute in general provides that any individual who attended an accredited Kansas high school for three years and either graduated or earned a Kansas general education development certificate, and meets the law's other criteria, is eligible to pay tuition rates equivalent to Kansas resident rates at regents schools. Although plaintiffs contend that the statute applies only to undocumented or illegal aliens, the statute appears to apply to all, with a few minor exceptions, who meet the designated criteria "regardless of whether the person is or is not a citizen of the United States of America." K.S.A. 76-731a(b)(2).

[2] All parties have referred to individuals who are not United States citizens who have entered this country unlawfully without documentation as "undocumented" or "illegal" aliens. The court intends to use these terms interchangeably during the course of this opinion.

the defendants from enforcing K.S.A. 76-731a as it applies to "aliens who are unlawfully present in the United States." They also ask the court to enjoin the defendants from discriminating between students who have been classified as legal residents of Kansas and them. Finally, they ask the court to declare that K.S.A. 76-731a violates federal law and is unconstitutional as it applies to "aliens who are unlawfully present in the United States."

On May 10, 2005 the court held a hearing in this matter. The following motions were considered at that time: (1) defendants' motion to dismiss; (2) intervenors' motion to dismiss; and (3) plaintiffs' motion to dismiss intervenor-defendants. Prior to that hearing, the court had conducted several telephone conferences with the parties. The parties were advised that all evidence on the issues in this case should be presented prior to the May 10th hearing or at that hearing. All parties were in agreement that the hearing on May 10th would constitute the final hearing in this matter. The court subsequently received materials outside the pleadings from all parties. Under these circumstances, the court shall convert the pending motions to dismiss to motions for summary judgment. *See Burnham v. Humphrey Hospitality Reit Trust, Inc.*, 403 F.3d 709, 713 (10th Cir. 2005); *Alexander v. Oklahoma*, 382 F.3d 1206, 1214 (10th Cir. 2004). Having considered all of the evidence presented and heard extensive argument from the parties, the court is now prepared to rule.

This litigation arises from the passage of two laws by Congress in 1996 restricting immigration and the status of immigrants: the Personal Responsibility and Work Opportunity Reconciliation Act of 1996

(PRWORA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). These laws were passed by the same Congress only about six weeks apart. They were passed in part in response to the Supreme Court's decisions in *Plyler v. Doe*, 457 U.S. 202 (1982) (Texas statute which denies free education to alien children violates Equal Protection Clause) and *Toll v. Moreno*, 458 U.S. 1 (1982) (University of Maryland's policy of denying treaty organization aliens the opportunity to pay reduced, in-state tuition constituted a violation of the Supremacy Clause).

The Kansas legislature passed the instant statute in 2004. The court is aware of least seven other states that have passed legislation to provide in-state tuition rates to illegal aliens: California, Illinois, New York, Oklahoma, Texas, Utah and Washington. The legislature of Maryland passed legislation to allow in-state tuition to illegal aliens, but the legislation was vetoed by the governor. At least two states have specifically passed statutes that do not allow illegal aliens to gain resident tuition status: Alaska and Mississippi. The legislature of Virginia passed legislation prohibiting illegal aliens from receiving resident tuition, but the legislation was vetoed by the governor. The court believes this is the first case to challenge the type of legislation passed by Kansas.

Plaintiffs' complaint consists of seven claims for relief. The court shall spend some time analyzing the claims made by the plaintiffs due to arguments that have been made about the confusing nature of the claims.

In Count 1, which is entitled "Violation of 8 U.S.C. § 1621," plaintiffs contend that K.S.A. 76-731a violates 8 U.S.C. § 1621.[3]

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[3] This statute provides as follows:

(a) In general

Notwithstanding any other provision of law and except as provided in subsections (b) and (d) of this section, an alien who is not--

(1) a qualified alien (as defined in section 1641 of this title),

(2) a nonimmigrant under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.], or

(3) an alien who is paroled into the United States under section 212(d)(5) of such Act [8 U.S.C.A. § 1182(d)(5)] for less than one year, is not eligible for any State or local public benefit (as defined in subsection (c) of this section).

(b) Exceptions

Subsection (a) of this section shall not apply with respect to the following State or local public benefits:

(1) Assistance for health care items and services that are necessary for the treatment of an emergency medical condition (as defined in section 1396b(v)(3) of Title 42) of the alien involved and are not related to an organ transplant procedure.

(2) Short-term, non-cash, in-kind emergency disaster relief.

(3) Public health assistance for immunizations with respect to immunizable diseases and for testing and treatment of symptoms of communicable diseases whether or not such symptoms are caused by a communicable disease.

(4) Programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General, in the Attorney General's sole and unreviewable discretion after consultation with appropriate Federal agencies and departments, which (A) deliver in-kind services at the community level, including through public or private nonprofit agencies; (B) do not condition the provision of assistance, the amount of assistance provided, or the cost of assistance provided on the individual recipient's income or

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resources; and (C) are necessary for the protection of life or safety.
(c) "State or local public benefit" defined
(1) Except as provided in paragraphs (2) and (3), for purposes of this subchapter the term "State or local public benefit" means--
(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and
(B)
(2) Such term shall not apply--
(A) to any contract, professional license, or commercial license for a nonimmigrant whose visa for entry is related to such employment in the United States, or to a citizen of a freely associated state, if section 141 of the applicable compact of free association approved in Public Law 99-239 or 99-658 (or a successor provision) is in effect;
(B) with respect to benefits for an alien who as a work authorized nonimmigrant or as an alien lawfully admitted for permanent residence under the Immigration and Nationality Act [8 U.S.C.A. § 1101 et seq.] qualified for such benefits and for whom the United States under reciprocal treat agreements is required to pay benefits, as determined by the Secretary of State, after consultation with the Attorney General; or
(C) to the issuance of a professional license to, or the renewal of a professional license by, a foreign national not physically present in the United States.
(3) Such term does not include any Federal public benefit under section 1611(c) of this title.
(d) State authority to provide for eligibility of illegal aliens for State and local public benefits
A State may provide that an alien who is not lawfully present in the United States is eligible for any State or local public benefit for which such alien would otherwise be ineligible under subsection (a) of this section only through the enactment of a State law after August 22, 1996, which affirmatively provides for such eligibility.

According to plaintiffs, § 1621 prohibits any state from offering any post-secondary educational benefit, including in-state tuition, to illegal aliens. Plaintiffs further allege that K.S.A. 76-731a does not meet the statutory loophole set forth in 8 U.S.C. § 1621(d), which allows states under certain circumstances to provide eligibility for illegal aliens to state benefits, because it does not contain the express statutory language required by federal law.

In Count 2, which is entitled "Violation of 8 U.S.C. § 1623," plaintiffs assert that K.S.A. 76-731a violates 8 U.S.C. § 1623(a).[4] According to plaintiffs, § 1623 prohibits any state from providing any postsecondary education benefit, including in-state tuition, to an illegal alien unless a United States citizen is eligible for the same benefit. Plaintiffs further assert that § 1623 eliminated the application of 8 U.S.C. § 1621(d).

In Count 3, which is entitled "Violation of Regulations Governing Alien Students," plaintiffs contend that K.S.A. 76-731a violates the comprehensive regulatory scheme enacted by the federal government to govern the admission of nonimmigrant aliens to the United States for the

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[4] This portion of the statute provides as follows:
(a) In general
Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is such a resident.

purpose of enrolling them as students at postsecondary educational institutions. They specifically point to the Student and Exchange Visitor Information System (SEVIS), a comprehensive computerized system designed to track international students and exchange students. Plaintiffs contend that K.S.A. 76-731a frustrates this federal purpose by allowing aliens to illegally pose as students at Kansas institutions of higher education while remaining outside the SEVIS registration system.

In Count 4, which is entitled "Preemption," plaintiffs claim that K.S.A. 76-731a is preempted by the federal regulation of immigration. Plaintiffs suggest that Congress clearly intended to "occupy the field" in the area of regulating the provision of public benefits to aliens without a lawful immigration status. They assert: "The power to regulate immigration is unquestionably an exclusively federal power, and any state statute that regulates immigration is unconstitutional and therefore proscribed. . . . States can neither add to nor take from conditions lawfully imposed upon the admission or residence of aliens in the United States. . . . [K.S.A. 76-731a] is preempted because it is impossible for a person who is an illegal alien or otherwise present in the United States to both receive postsecondary education under [K.S.A. 76-731a], and to comply with federal immigration law."

In Count 5, which is entitled "Creation of Residence Status Contrary to Federal Law," plaintiffs allege that K.S.A. 76-731a creates residence status for illegal aliens contrary to federal law. Plaintiffs assert: "Congress has created a legal disability under federal law that renders illegal aliens incapable of claiming

bona fide legal domicile in Kansas, notwithstanding the fact of physical presence or a subjective 'intent' to remain indefinitely in the jurisdiction." They further allege: "None of the members of the class of alien beneficiaries of [K.S.A. 76-731a] who are illegal aliens possesses federal authorization to remain in the United States for even the shortest period of time, and therefore cannot, as a matter of law acquire or possess the requisite intent to be a legal resident or domiciliary of Kansas. Kansas may not deem such non-citizens to possess such intent, nor alternatively waive such intent by exercise of its legislative powers." By doing so, plaintiffs argue that K.S.A. 76-731a violates the comprehensive scheme established by federal law for aliens.

In Count 6, which is entitled "Infringement Upon Exclusive Federal Powers," plaintiffs assert that K.S.A. 76-731a impermissibly infringes on Constitutional powers reserved to the federal government. They contend that the challenged Kansas law violates Congress' power over the regulation of interstate commerce and foreign affairs.

Finally, in Count 7, which is entitled "Violation of Equal Protection Clause of U.S. Constitution," plaintiffs contend that K.S.A. 76-731a violates the Equal Protection Clause of the United States Constitution. Plaintiffs assert that equal protection is denied them based upon the following argument: "Illegal aliens have been deemed by Defendants to be Kansas residents for the express purpose of affording such aliens state postsecondary education benefits to which they are not entitled under federal law. Defendants have further denied nonresident U.S.

citizens Plaintiffs the identical postsecondary education benefits to which they are expressly entitled by federal law." They further state:

> Discriminating against U.S. citizens in favor of illegal aliens in the provision of postsecondary education benefits does not serve any important government objective. Awarding valuable benefits to individuals whose presence in the United States constitutes an ongoing violation of federal law plainly undermines the general governmental objective of promoting rule of law. Moreover, any purported government interest in encouraging higher education in the State's workforce is unpersuasive, because the illegal alien recipients of such postsecondary education benefits are not legally eligible to remain in the State of Kansas after completing their courses of study.

The court has provided a thorough explanation of the claims in order to respond to some of the arguments that have been made by the parties. The court will discuss these contentions as we address the pending motions.

PLAINTIFFS' MOTION TO DISMISS INTERVENOR-DEFENDANTS

Plaintiffs seek to dismiss the three anonymous illegal alien intervenors and the two organizational

intervenor-defendants.[5] Plaintiffs suggest the three individual intervenors should be dismissed because they failed to disclose their real names as required by Judge O'Hara's order of February 24, 2005. The court finds this issue moot. The intervenors have not included these individuals in their amended answer. Since they are no longer a part of this case, this aspect of the plaintiffs' motion is moot.

Plaintiffs also suggest that the association intervenors KLULAC and HALO should be dismissed because they lack associational standing. They initially argued that these organizations had not disclosed sufficient information to ascertain their standing to intervene. In response to that argument, KLULAC and HALO agreed to provide *in camera* information to the court for consideration of their standing. They have recently provided that information to the court.

In response to the information provided to the court, plaintiffs argue that KLULAC and HALO have failed to demonstrate they have standing in this case. They assert that (1) the organizations need to show that they have at least two members who have standing to intervene in this case; (2) these members cannot be one of the individual intervenors who failed

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[5] Procedurally, the court is puzzled by this motion. Many of the issues raised by plaintiffs in this motion were raised during the proceedings on the intervenors' motion to intervene. Judge O'Hara considered them and rejected them. Plaintiffs, however, failed to seek review of the magistrate's decision. This failure to seek review generally waives any further consideration of these issues by this court or on appeal. *See* Fed.R.Civ.P. 72(a). Nevertheless, the court shall review the matters.

to comply with Judge O'Hara's order; (3) the members must have been members of the organizations on October 20, 2004, the date the associations sought to intervene; (4) the members must be individuals as defined by K.S.A. 76-731a(b)(2); and (5) the members must be illegal aliens who have filed or will file the affidavits described in K.S.A. 86-731a(b)(2)(C).

The question initially presented by plaintiffs' motion is whether a party seeking to intervene must satisfy not only the requirements of Rule 24, but also the standing requirements of Article III. The Supreme Court has declined to determine this issue. *See Diamond v. Charles*, 476 U.S. 54, 68-9 (1986). The circuits have reached differing conclusions with some requiring that intervenors must independently meet Article III standing requirements, *EEOC v. National Children's Center, Inc.*, 146 F.3d 1042, 1046 (D.C.Cir. 1998); *Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996); while others have held that intervenors need not show standing, *Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). The Tenth Circuit has not considered the issue. This court finds itself in agreement with those courts that have determined that intervenors need not make a showing of standing. Rule 24 does not require a proposed intervenor to prove standing, but only that, as a practical matter, its interest could be impaired. In addition,

> Article III represents a limitation on the power of the federal courts--not a requirement of all who seek to come before them. If, at the outset, a federal court has correctly determined that it has an actual "case" or "controversy" before it,

> the purpose of Article III is not frustrated by allowing intervenors to subsequently participate in the proceedings.

Habitat Educational Center, Inc. v. Bosworth, 221 F.R.D. 488, 493 (E.D.Wis. 2004) (citation omitted).

Even if the court were to find that a showing of standing was necessary, we would conclude that the intervenors have demonstrated standing. An organization must satisfy three requirements to have associational standing: (1) its members must otherwise have standing to sue in their own right; (2) the interests it seeks to protect must be germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1230 (10th Cir. 2001). The court has reviewed the information filed by the intervenors. The court is confident that the *in camera* information, as well as the other information submitted by the intervenors, demonstrates that the organizations have associational standing. Contrary to the argument of the plaintiffs, there is no requirement of multiple members, one member of each organization is sufficient to confer standing. *Warth v. Seldin*, 422 U.S. 490, 511 (1975); *American Library Ass'n v. FCC*, 401 F.3d 489, 492 (D.C.Cir. 2005); *Doe v. Porter*, 370 F.3d 558, 561 (6th Cir. 2004). Moreover, the court fails to find any support for plaintiffs' position that the members of the associations cannot be one of the individual intervenors who failed to comply with Judge O'Hara's order. Accordingly, this motion shall be denied.

DEFENDANTS'/INTERVENORS' MOTIONS TO DISMISS

The defendants make the following arguments in their motion to dismiss. First, they contend the plaintiffs lack standing to assert Counts 1, 3, 4, 5 and 6 because they have failed to establish the three necessary elements of Article III standing. Second, they further assert that Counts 1 through 6 should be dismissed because the statutes and regulations relied upon by the plaintiffs do not create private causes of action. Third, they argue that K.S.A. 76-731a is not preempted by any federal statutes or regulations. Finally, they contend that Count 7 should be dismissed because plaintiffs have not pled an equal protection violation. The defendants have also suggested that Governor Sebelius should be dismissed because she is not a proper party. They assert she has no responsibility in enforcing K.S.A. 76-731a.

The intervenors make the following arguments in their motion to dismiss. First, they contend that the court lacks standing to assert Counts 1, 3, 4, 5 and 6. Second, they contend that Count 1 through 6 should be dismissed because the statutes and regulations relied upon by the plaintiffs do not create private causes of action. Finally, they contend that all claims asserted by the plaintiffs either fail to state a claim upon which relief can be granted or simply legally lack merit.

Governor Kathleen Sebelius

The defendants contend that Governor Sebelius is not a proper party to this lawsuit. They contend she should be dismissed because she has no role in

enforcing K.S.A. 75-731a. "In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Ex Parte Young*, 209 U.S. 123, 157 (1908). "Under United States Supreme Court precedent, when a plaintiff challenges the constitutionality of a rule of law, it is the state official designated to enforce that rule who is the proper defendant, even when that party has made no attempt to enforce the rule." *American Civil Liberties Union v. Florida Bar*, 999 F.2d 1486, 1490 (10th Cir. 1993).

Under Kansas law, the Governor has no involvement with the enforcement of K.S.A. 76-731a. The Kansas Constitution merely gives the Governor generalized responsibility for "enforcement of the laws of this state." Kansas Const. Art. 1, § 3. This general enforcement power, however, is not sufficient to establish the connection to the statute required to meet the *Ex parte Young* exception to Eleventh Amendment immunity. *See Women's Emergency Network v. Bush*, 323 F.3d 937, 949-50 (11th Cir. 2003)(where enforcement of state statute is the responsibility of parties other than governor, the governor's general executive power to enforce the statute is insufficient to confer jurisdiction over him in an action challenging statute as unconstitutional); *Waste Management Holdings, Inc. v. Gilmore*, 252 F.3d 316, 331 (4th Cir. 2001)(mere fact governor is under general duty to enforce laws does not make him a proper defendant in every action attacking

constitutionality of a state statute), *cert. denied*, 535 U.S. 904 (2002). Accordingly, the court shall dismiss Governor Sebelius as a defendant in this action.

Standing--Counts 1, 3, 4, 5 and 6

The defendants and intervenors contend that plaintiffs lack standing to assert claims in Count 1 and Counts 3 through 6. Both parties initially agreed that plaintiffs do have standing to assert the claim under § 1623 in Count 2 and the claim under equal protection in Count 7.[6]

It is well established that to litigate a justiciable controversy under Article III, a plaintiff must have standing to maintain suit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Morgan v. McCotter*, 365 F.3d 882, 887 (10th Cir. 2004). A party "raising only a generally available grievance about government--claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large--does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74. As explained recently by the Tenth Circuit:

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[6] Following oral argument, the court directed the parties to provide supplemental briefs on the issue of plaintiffs' standing to assert their equal protection claim. In light of the court's request, the defendants and intervenors have taken different positions on this issue. The court shall consider this issue in our discussion of the equal protection claim.

> Although the standing question is often dressed in the dazzling robe of legal jargon, its essence is simple-- what kind of injuries are courts empowered to remedy and what kind are they powerless to address. Standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy.

Heath v. Board of County Commissioners of Boulder County, 92 Fed.Appx. 667, 671-72 (10th Cir. 2004) (quotations and citations omitted).

There are three requirements to Article III standing: (1) injury-in-fact, (2) causation, and (3) redressability. *Essence, Inc. v. City of Fed. Heights*, 285 F.3d 1272, 1280 (10th Cir.), *cert. denied*, 537 U.S. 947 (2002). An injury-in-fact is an "'invasion of a legally protected interest' that is (a) concrete and particularized and (b) actual or imminent, i.e., not conjectural or hypothetical." *Id.* (quoting *Lujan*, 504 U.S. at 560). Causation requires that the injury is fairly traceable to the defendant's conduct, rather than some third party not before the court. *Id.* Redressability means that it is likely that a favorable court decision will redress the injury of the plaintiff. *Id.* If a party satisfies the minimal constitutional requirements, then a court may still deny standing for prudential reasons, "a judicially created set of principles that, like constitutional standing, places 'limits on the class of persons who may invoke the courts' decisional and remedial powers.'" *Board of County Commissioners of Sweetwater County v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002) (quoting *Warth*, 422 U.S. at 499). The burden of establishing standing rests on the party invoking federal

jurisdiction, and the evidence needed to carry that burden depends on the stage of the litigation. *Id.* At the summary judgment stage when standing is at issue, a plaintiff must demonstrate that there exists no genuine issue of material fact as to justiciability, and "mere allegations" of injury, causation, and redressability are not sufficient. *Id.*

The defendants and the intervenors argue initially that plaintiffs have no injury in fact. They point out that plaintiffs are not affected in any way by K.S.A. 76-731a. They assert:

> [K.S.A. 76-731a] only affects the price certain students pay to attend a regents school. Thus, the *only* people affected by the amount of Tuition charged to certain students under [K.S.A. 76-731a] are the students who satisfy each of its requirements--and plaintiffs are not among them. Plaintiffs do not have personal rights which are affected.

The defendants and intervenors further argue that a favorable decision will not benefit plaintiffs. Defendants and intervenors argue that striking down K.S.A. 76-731a as preempted by federal law will not benefit plaintiffs. They state: "Instead, Plaintiffs would simply deny certain Kansas high school graduates the right to pay in-state tuition."

Plaintiffs respond that they "possess a property right to the tuition premiums charged to them by Defendants under color of state law [K.S.A. 76-731a], a right arising under 8 U.S.C. § 1621." The position of plaintiffs is that they have suffered an injury by being

forced to pay out-of-state tuition while illegal aliens under K.S.A. 76-731a have been allowed to pay in-state tuition. They further contend that college education is a scarce resource and that competition for that resource gives them standing. Finally, they assert that, beyond their specific injury of having to pay more tuition, they are part of a larger group of individuals who possess standing to challenge K.S.A. 76-731a, "namely all citizens and lawfully-admitted aliens paying tuition at Kansas postsecondary educational institutions." In support of this argument, they make the following claim: "The more illegal aliens take advantage of the state subsidy under [K.S.A. 76-731a], the more likely it is that such subsidies will increase the financial burdens on Kansas universities and necessitate greater tuition hikes than would have otherwise occurred."

After a careful review of the evidence and the arguments, the court finds that plaintiffs have failed to demonstrate that they are injured in fact by K.S.A. 76-731a. Injury-in-fact must be concrete and imminent. *Essence, Inc.*, 285 F.3d at 1281. Hypothetical or conjectural harm is not sufficient. *Id.* When a law does not apply to a party, that party has no invasion of a legally protected interest. *Id.* Here, none of the plaintiffs are subject to the provisions of K.S.A. 76-731a. Prior to the passage of the law, plaintiffs paid out-of-state tuition. With the passage of K.S.A. 76-731a, plaintiffs continued to pay outof-state tuition. The law passed by the Kansas legislature does not apply to plaintiffs, and plaintiffs have made no argument that it does.

Plaintiffs' suggestion that they somehow have standing based on some property right in their tuition or based upon increased tuition rates is completely unfounded. They have provided no support for the contention that they, as out-of-state residents, have a "property right" in in-state tuition rates. In addition, they have failed to provide any evidentiary support for the contention that K.S.A. 76-731a has led to an increase in tuition rates. Plaintiffs have provided affidavits in which they show that their tuition rates have increased. They have also cited to newspaper articles that show that tuition rates did rise at Kansas universities in the time period following the passage of K.S.A. 76-731a. However, the record is barren of any evidence that the resulting tuition increases were the product of K.S.A. 76-731a. In fact, the anecdotal evidence before the court suggests otherwise. First, we note that the newspaper articles noted by plaintiffs also indicate that tuition rates at Kansas universities increased in the two years preceding the passage of K.S.A. 76-731a. Second, the information provided to the court suggests that the impact of K.S.A. 76-731a has been minimal. The parties have only identified a handful of students who have been able to take advantage of K.S.A. 76-731a, and most of those are not illegal aliens. As a result, we fail to find that plaintiffs have identified any injury-in-fact resulting from the passage of K.S.A. 76-731a.

Moreover, plaintiffs are unable to establish any legally connected interest to 8 U.S.C. § 1621, SEVIS or the general immigration laws. Plaintiffs are not affected by any of the specifically cited immigration laws or the general immigration laws in any particularized way. Plaintiffs are unable to assert or

demonstrate any personal injury resulting from their violation. They stand in the same shoes as any citizen. Such circumstances fail to establish standing. *See Lujan*, 504 U.S. at 573-74 (plaintiff "claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large--does not state an Article III case or controversy.").

Finally, plaintiffs have failed to show that a favorable decision on Counts 1, 3, 4, 5 and 6 will redress the injury to them. If the court were to find K.S.A. 76-731a is preempted by federal law or in violation of federal law as suggested in Counts 1, 3, 4, 5 and 6, plaintiffs will not receive any benefit. A favorable decision for the plaintiffs would require those who have received the benefit of K.S.A. 76-731a to pay more, but plaintiffs' tuition bills would not change. Since the relief that could be granted to plaintiffs by the court will provide them with no personal benefit, they lack standing. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (1976) ("The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Art. III requirement.").

In sum, plaintiffs are in a situation similar to others who have challenged other immigration policies and laws. *See, e.g., Federation for American Immigration Reform, Inc. v. Reno*, 93 F.3d 897 (D.C.Cir. 1996) (immigration reform group lacks standing to challenge government's scheme for parole and adjustment of Cuban nationals as violation of federal immigration law), *cert. denied*, 521 U.S. 1119

(1997); *Sadowski v. Bush*, 293 F.Supp.2d 15 (D.D.C. 2003) (individual lacks standing to challenge government's failure to fully enforce immigration laws and to allow illegal immigrants into United States); *Ridge v. Verity*, 715 F.Supp. 1308 (W.D.Pa. 1989) (members of U.S. House of Representatives, certain states and immigration reform group lack standing to challenge inclusion of illegal aliens in 1990 census for purposes of congressional apportionment). Accordingly, the court finds that plaintiffs lack standing to bring the claims asserted in Counts 1, 3, 4, 5 and 6 of their amended complaint.

Private Right of Action--Count 2

With the aforementioned decision, the court turns to consideration of the defendants'/intervenors' argument concerning Count 2. The defendants/intervenors contend that Count 2 should be dismissed because 8 U.S.C. § 1623 does not create a private right of action.

In briefs and arguments made after the defendants/intervenors filed their motions to dismiss, plaintiffs sought to recharacterize their claims. Although only one of the claims in the amended complaint appeared to be a preemption claim, plaintiffs suggested that the first six claims were all preemption claims. The court notes that none of the claims other than Count 4 use the word preemption or preempt in them. Plaintiffs apparently chose to take this approach because they believed they had clear Tenth Circuit authority, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004), that allowed them to proceed on preemption claims without the

requirement that the particular statute or series of statutes provided a private cause of action. This plan, however, did not cure the standing problem they faced on their claims. To the extent that the plaintiffs contend that their first six claims are causes of action based upon preemption, the court finds that the plaintiffs lack standing to pursue them for the reasons previously stated. The defendants and intervenors conceded that plaintiffs had standing to pursue a claim based upon a violation of 8 U.S.C. § 1623. They recognized that plaintiffs' cause of action based upon a claim of enforcing § 1623, if meritorious, would meet the Article III standing requirements. The court agrees that plaintiffs do have standing on this claim. Accordingly, we must consider whether § 1623 creates a private right of action so that plaintiffs can pursue a claim to enforce it.

In *Boswell v. Skywest Airlines, Inc*, 361 F.3d 1263, 1266 (10th Cir. 2004), the Tenth Circuit summarized the law for determining when a statute creates a private right of action as follows:

> The test for determining whether a statute creates a private right of action has evolved substantially over the last thirty years. Supreme Court cases decided early in this period focused on Congressional purpose. *See, e.g., J.I. Case Co. v. Borak*, 377 U.S.426, 433, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964) (stating that "under the circumstances here it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose" and concluding that sections 14(a) and 27 of the Securities Exchange

Act, 15 U.S.C. §§ 77n(a), 77aa, authorized a federal cause for rescission or damages to a stockholder). Subsequently, the Court formulated a four-part inquiry, asking whether: (1) the plaintiff is part of the class for whose benefit the statute was enacted; (2) there is any indication of legislative intent, explicit or implicit, either to create or to deny a private right of action; (3) it would be consistent with the underlying purpose of the legislative scheme to imply a private right of action for the plaintiff; and (4) the cause of action is one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law. *See Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975); *see also Southwest Air Ambulance, Inc. v. City of Las Cruces*, 268 F.3d 1162, 1169 (10th Cir.2001) (discussing Cort).

Later Supreme Court decisions have shifted the inquiry again. Now, "*Cort's* four factors have been effectively condensed into one--whether Congress expressly or by implication, intended to create a private cause of action." *Sonnenfeld v. City & County of Denver*, 100 F.3d 744, 747 (10th Cir.1996) (citing *Transamerica Mortgage Advisors v. Lewis*, 444 U.S. 11, 15-16, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979) and *Touche Ross & Co. v. Redington*, 442 U.S. 560, 575, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979)). Thus, in its recent decisions, the Supreme Court has emphasized that the private right of action inquiry focuses on the Congressional intent underlying the particular statute at issue:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. Statutory intent on this latter point is determinative. Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute. Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.

Alexander v. Sandoval, 532 U.S. 275, 286-87, 121 S.Ct.1511, 149 L.Ed.2d 517 (2001) (internal quotation marks and citations omitted). This circuit's decisions have emphasized that Congressional intent is determinative. *See, e.g, Davis-Warren Auctioneers, J.V. v. FDIC*, 215 F.3d 1159, 1162 (10th Cir. 2000) ("To decide whether a private right of action is implicit in a statute, we must determine 'whether Congress', expressly or by implication, intended to create a private cause of action.") (internal quotation marks omitted); *Chemical Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 111 F.3d 1485, 1493 (10th Cir. 1997) ("In determining

whether an implied private right of action exists under a particular statute, the focus is solely on congressional intent.").

In determining Congressional intent under this newer standard, we examine the statute for "rights-creating language," *Sandoval*, 532 U.S. at 288, 121 S.Ct. 1511,--that which "explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n. 13, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), and language identifying "the class for whose especial benefit the statute was enacted," *id.* at 688 n. 9, 99 S.Ct. 1946 (internal quotation marks omitted). We also consider the relation between the specific provision at issue and the related statutory scheme. *Love*, 310 F.3d at 1353; *see, e.g.*, *Southwest Air*, 268 F.3d at 1170 (examining the general regulatory structure of the Federal Aviation Act, 1958, 49 U.S.C. § 40101 et seq, in determining that the Anti-Head Tax Act, 49 U.S.C. § 40116, does not create a private cause of action); *Chemical Weapons*, 111 F.3d at 1494 (examining the "general regulatory scheme, comprised in this instance by the myriad of environmental statutes that regulate the Army's operations [at the facility at issue]" in concluding that the 1986 Defense Authorization Act did not establish a private cause of action).

The defendants begin by arguing that IIRIRA, of which 8 U.S.C. § 1623 is part, does not explicitly give individuals a remedy to enforce immigration laws. In fact, it specifically provides that the Secretary of

Homeland Security has the responsibility to enforce it. *See* 8 U.S.C. § 1103(a)(1).[7] The intervenors concur in these arguments and assert that no support can be found for the idea that Congress intended to grant enforcement rights to any private citizens for the alleged violation asserted in Count 2.

Plaintiffs initially suggest that they have a private cause of action under § 1623 because "[n]o federal statute or regulation forecloses a right of action by U.S. citizens who are injured by a State violation of the requirements of [the statute]." They further argue that the language of the statute grants them express rights. They assert "[t]he language of the statute makes the U.S. citizen or national who is granted eligibility for a state postsecondary education benefit the beneficiary of the provision, even if he or she is not a resident of the state."

Plaintiffs have further suggested that they have a private cause of action under § 1623 because a private right of action is implied where a "compelling federal interest" dictates a reason for implementing civil remedies. They rely upon two Tenth Circuit cases from 1972 and 1973 for support of the "compelling federal interest" test. However, as pointed out by the

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[7] This statute reads as follows:
The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, Attorney General, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers. . . ."

defendants, the "compelling government interest" test is no longer used. As pointed out previously, the test has evolved from the four-factor *Cort* test to one factor: whether Congress, expressly or by implication, intended to create a private right of action.

With the application of that test, the court fails to find any support that Congress intended to create a private right of action through the passage of 8 U.S.C. § 1623. Congress specifically designated the Secretary of Homeland Security as the individual in charge of enforcing immigration laws. There is nothing in § 1623 or the other immigration statutes that demonstrates an intent by Congress to create a private right of action. As pointed out by the defendants, the focus of § 1623 is illegal aliens, not citizens. This focus on aliens, rather than plaintiffs or citizens in general, "creates no implication of an intent to confer rights on [the plaintiffs]." *Alexander v. Sandoval*, 532 U.S. 275, 290 (2001). Accordingly, the court finds that Count 2 must be dismissed because 8 U.S.C. § 1623 does not create a private right of action.

Equal Protection--Count 7

Finally, the court shall turn to the equal protection claim asserted by plaintiffs in Count 7. The Fourteenth Amendment to the United States Constitution guarantees that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." This means the state must treat similarly situated individuals similarly, in the absence of an adequate reason to distinguish between them. As a general rule, however, "'legislatures are presumed to have acted within their constitutional power despite

the fact, in practice, their laws result in some inequality.'" *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961)).

The court must consider the type of equal protection challenge asserted by plaintiffs. In Count 7 of their amended complaint, plaintiffs appear to allege only a facial equal protection challenge. However, in their briefs and during argument before the court, plaintiffs have suggested that they are also asserting an as-applied equal protection claim. The court would ordinarily be reluctant to consider the as-applied claim given its absence in the amended complaint. However, the court believes that the as-applied claim should be considered here for two reasons. First, the defendants/intervenors, although complaining about the lack of an as-applied claim in the amended complaint, have thoroughly responded to the claim. The court sees no prejudice to the defendants/intervenors in addressing this claim. Second, in the context of the present equal protection claim, a facial challenge would logically include within it an as-applied challenge. *See City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 478 (1985) (Marshall, J., concurring in part and dissenting in part) ("The formal label under which an equal protection claim is reviewed is less important than careful identification of the interest at stake and the extent to which society recognizes the classification as an invidious one."); *Ramos v. Town of Vernon*, 353 F.3d 171, 174 n. 1 (2nd Cir. 2003).

Although the defendants/intervenors initially conceded standing on the plaintiffs' equal protection

claim, the court directed the parties to submit briefs on that issue. The parties have since provided the court with new arguments on this issue. The court has previously discussed standing in some detail, but we shall further discuss the law as it relates to standing where equal protection claims are asserted.

In their equal protection claim, plaintiffs assert that K.S.A. 76-731a creates two classes of non-Kansas residents: illegal or undocumented aliens and United States citizens.[8] According to plaintiffs' allegations, although these two classes are equally situated, the illegal aliens can receive in-state tuition rates under K.S.A. 76-731a while the United States citizens cannot. Plaintiffs suggest that the unavailability of in-state tuition to United States citizens from other states is the statute's discriminatory feature.

In addressing the issue of standing, plaintiffs point to several arguments. First, they rely upon affirmative action cases in support of their position that they have

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[8] The defendants and intervenors argue strenuously that plaintiffs' primary flaw in its equal protection argument is that there is no classification based on alienage. They point out that K.S.A. 76-731a applies equally to all individuals, aliens or U.S. citizens. They contend: "There is no unequal or disparate treatment based on alienage and both groups or classes are treated equally. Since both undocumented aliens and nonresident U.S. citizens can obtain tuition rates equivalent to resident rates through [K.S.A. 76-731a] on the identical basis, Count VII should be dismissed." The court leaves this issue for another day, because we do not find that plaintiffs have standing to assert their equal protection claim even under the manner in which they contend K.S.A. 76-731a must be interpreted.

standing to assert their equal protection claim. Specifically, they point to *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 663-64 (1993) for support. Second, they assert they are injured by K.S.A. 76-731a because they are forced to pay the higher out-of-state tuition rates. This argument is two-fold. They initially point out that they are required to pay higher rates simply by their status as out-of-state residents, but they also contend that the passage of K.S.A. 76-731a "places upward cost pressure on the tuition rates paid by all students, driving nonresident tuition rates higher."

In *City of Jacksonville*, an association of contractors challenged an ordinance that gave preferential treatment to certain minority-owned businesses in the award of city contracts. The Supreme Court held that the injury in fact constitutionally required for standing to challenge on equal protection ground a racially discriminatory procedure for distributing a scarce governmental benefit, such as public works contracts, is the "inability to compete on an equal footing" for the rationed benefit, not the deprivation of the benefit itself. *City of Jacksonville*, 508 U.S. at 666.

Plaintiffs seem to believe that *City of Jacksonville* applies to every case where an equal protection claim is asserted. We must disagree. The Court in *City of Jacksonville* was concerned with standing in the context of an equal protection claim where plaintiffs claimed they had been disadvantaged by a governmental program that limited opportunities. The Court made clear that its decision was limited to these circumstances: "The 'injury in fact' in *an equal*

protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* (emphasis added).

The nature of the equal protection claim here differs from that asserted in *City of Jacksonville*. K.S.A. 76-731a establishes no barriers precluding plaintiffs from admission to Kansas universities. The fact that K.S.A. 76-731a allowed undocumented aliens to pay in-state tuition rates did nothing to change the situation of plaintiffs. From this standpoint, the exception created by K.S.A. 76-731a does not differ from the myriad of other exceptions created by Kansas law to allow some individuals to pay in-state tuition. *See, e.g.*, K.S.A. 76- 729(b)(1) (persons which includes spouses and dependents who are employees of a state educational institution); K.S.A. 76-729(b)(2) (persons which include spouses and dependents who are in military service); K.S.A. 76-729(b)(4) (persons which includes spouses and dependents having special domestic relations circumstances).

Plaintiffs have not been denied any benefit by K.S.A. 76-731a because they cannot fulfill the lawful, non-discriminatory requirements or qualifications for the benefit. As explained by the defendants and the intervenors, the reason that plaintiffs must pay out-of-state tuition is K.S.A. 76-729, not K.S.A. 76-731a. There is no dispute that states can force out-of-state residents to pay more in tuition. *Vlandis v. Kline*, 412 U.S. 441, 452-53 (1973) ("We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend

such institutions on a preferential tuition basis."). None of the plaintiffs meet the first two requirements for the application of K.S.A. 76-731a. Plaintiffs have made no suggestions that these requirements are unlawful or discriminatory. As noted by the Tenth Circuit:

> [A] person who fails to satisfy lawful, nondiscriminatory requirements or qualifications for the benefit lacks standing to raise claims of discrimination in the denial of the benefit. . . . "[A] mere abstract denial of equal opportunity does not constitute injury in fact. A general denial of equal opportunity does not confer standing on a particular individual unless that individual would have had access to the benefit at stake in the absence of discrimination." *N.A.A.C.P., Boston Chapter v. Harris*, 607 F.2d 514, 520 (1st Cir. 1979). Discrimination cannot be the cause of injury to an applicant who could not have obtained the benefit even in the absence of the discrimination.

Wilson v. Glenwood Intermountain Properties, Inc., 98 F.3d 590, 593-94 (10th Cir. 1996).

Under these circumstances, the court finds that plaintiffs cannot demonstrate that K.S.A. 76-731a has any application to them. Accordingly, they are unable to demonstrate sufficient injury to establish standing. *See Petit v. City of Chicago*, 352 F.3d 1111, 1113 (7th Cir. 2003) (officers who would have been rejected for promotion even without allegedly discriminatory process lacked standing to bring equal protection claim

against that process because they failed to suffer cognizable injury), cert. denied, 541 U.S. 1074 (2004); *see also Rector v. City and County of Denver*, 348 F.3d 935, 945 (10th Cir. 2003) (named representatives of class of parking ticket recipients lacked standing to pursue claim that tickets deprived class of due process by giving erroneous impression the recipients would necessarily incur late fee if they tried to contest ticket; neither representative claimed to have legal basis for contesting ticket, and so could claim no injury in fact).

The court's earlier comments on the injury suffered by the plaintiffs concerning increased tuition rates are applicable here. Plaintiffs have made no showing that K.S.A. 76-731a has or will increase tuition rates in Kansas. Thus, the court fails to find that plaintiffs have established any injury in fact on their equal protection claim.

In addition, the court's prior discussion on redressability for the purposes of standing on Counts 1, 3, 4, 5 and 6 is equally applicable to plaintiffs' equal protection claim. The court cannot provide any relief that would be beneficial to the plaintiffs. *See, e.g., Doe v. Pryor*, 344 F.3d 1282, 1285-87 (11th Cir. 2003) (lesbian mother, who lost child custody suit in state court based in part on the use of Alabama statute criminalizing "deviate sexual intercourse," lacked standing to challenge the statute on equal protection grounds because injury could not be redressed). Plaintiffs will still pay out-of-state tuition rates even if the court found that K.S.A. 76-731a violated the Equal Protection Clause. Accordingly, for all of the aforementioned reasons, the court finds that plaintiffs lack standing to assert their equal protection claim.

In reaching the decisions in this case, the court did not reach the issues of most of the claims asserted by the plaintiffs. This is both regrettable and fortunate. The issues raised by this litigation are important ones. The decision on what to do concerning the education of illegal aliens at the postsecondary level in our country is indeed significant. That decision, however, is probably best left to the United States Congress and the Kansas legislature.

IT IS THEREFORE ORDERED that defendants' and intervenors' motions to dismiss (Doc. ## 41 and 43), which the court has converted to motions for summary judgment, be hereby granted. The court hereby dismisses Counts 1 and 3 through 7 due to plaintiffs' lack of standing. The court further dismisses Count 2 because plaintiffs have no private right of action under 8 U.S.C. § 1623. Finally, the court also dismisses Governor Kathleen Sebelius as a party to this action.

IT IS FURTHER ORDERED that plaintiffs' motion to dismiss intervenor-defendants (Doc. # 81) be hereby denied.

IT IS SO ORDERED.

Dated this 5th day of July, 2005 at Topeka, Kansas.

s/Richard D. Rogers
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

Case No. 04-4085-RDR

[Filed February 24, 2005]

KRISTEN DAY, et al.,)
)
Plaintiffs,)
)
v.)
)
KATHLEEN SEBELIUS, et al.,)
)
Defendants.)
)

MEMORANDUM AND ORDER

I. Introduction and Background.

This suit challenges the legality of Kansas House Bill No. 2145 ("HB 2145"), which went into effect on July 1, 2004. Highly summarized, HB 2145 makes certain undocumented aliens in Kansas eligible for

favorable in-state college tuition rates.[1] To qualify, the student simply must have attended an accredited Kansas high school for at least three years, received a high school diploma or general educational development certificate from a Kansas institution, and not be a resident of another state. In addition, undocumented and documented non-citizen aliens must sign an affidavit agreeing to upgrade their immigration status as soon as they are eligible.

This suit was filed by Kristen Day, along with more than twenty other named plaintiffs, all of whom allegedly are students (or their parents who support them financially) classified as non-residents for purposes of college tuition and fees at state-funded institutions in Kansas. Plaintiffs have sued Kathleen Sebelius (the Governor of Kansas), along with various university officials who are responsible for implementing HB 2145. Plaintiffs seek declaratory and injunctive relief, specifically, to prevent defendants from discriminating between them and the undocumented aliens who have been classified as residents for the more favorable in-state tuition rates. In support of their suit, plaintiffs contend that HB 2145 violates two federal statutes, 8 U.S.C. §§ 1621 and 1623. Plaintiffs further contend that HB 2145 violates their Equal Protection rights under the Fourteenth Amendment to the United States Constitution, as well as other provisions of the Constitution.

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[1] In fact, the language of HB 2145 does not limit its application to undocumented aliens. However, as a practical matter, it is unlikely that others would benefit from the law.

This case is now before the court on the motion of the Kansas League of United Latin American Citizens ("Kansas LULAC"), the Hispanic American Leadership Organization ("HALO"), Kansas State [University] chapter, and three presently anonymous college students (A. Doe, J. Doe, and L. Doe), all of whom seek leave to intervene as additional defendants (**doc. 11**). Two of the proposed Doe defendants are enrolled at Kansas State University in Manhattan, and the third is enrolled at the University of Kansas in Lawrence; all three also have filed a separate motion for a protective order, seeking to allow them to continue to proceed anonymously in this litigation (**doc. 13**).

Plaintiffs have filed a consolidated response opposing both of the above-described motions (doc. 31). In addition, the court has considered the memorandum filed in support of the motion to intervene (doc. 12), the proposed intervenors' already-filed answer to plaintiffs' amended complaint (doc. 40), the memorandum filed in support of the motion for protective order (doc. 14), the memorandum in support of plaintiffs' consolidated response (doc. 32), the proposed intervenors' reply brief with regard to the motion to intervene (doc. 36), and finally, the proposed intervenors' reply in support of the motion for protective order (doc. 37). The court is now ready to rule.

Plaintiffs, it should be noted, suggest that the above-described motions present "weighty substantive issues," specifically: (1) whether any of the proposed intervenors has a fundamental property stake at issue in this case; (2) whether Article III standing exists for organizational entities such as Kansas LULAC and

HALO to intervene; and (3) whether the court may enter any protective order that would serve to conceal the identity of undocumented aliens. Plaintiffs further suggest, but without citing any authority, that the undersigned magistrate judge should confine his involvement to "preliminary" or "procedural" issues, so as to allow the Hon. Richard D. Rogers, Senior U.S. District Judge, to decide the motions.

Plaintiffs apparently misunderstand the powers conferred to magistrate judges in this district by virtue of 28 U.S.C. § 636(b)(1), Fed. R. Civ. P. 72, and D. Kan. Rule 72.1.1(c) and (d). Although the powers of a federal magistrate judge are more limited than those of a district judge, the relevant distinction is between "non-dispositive" and "dispositive" rulings, i.e., absent the consent of all parties, a magistrate judge only may make the former and may not make the latter. As a matter of law, an order granting leave to intervene is non-dispositive.[2] Further, plaintiffs certainly cannot seriously suggest that a routine motion for protective order is dispositive. In any event, having been informed of plaintiffs' record position, Judge Rogers has asked the undersigned to proceed with deciding these motions.

Regardless of whether plaintiffs' stated concerns are well-placed, the undersigned does not presume to establish any "law of the case" as it relates to the relative merits of the parties' positions concerning the legality of HB 2145. If Judge Rogers disagrees with

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[2] *See United States v. Certain Real Property*, 751 F.Supp. 1060, 1061 (E.D.N.Y. 1989).

any of the undersigned's findings in support of the non-dispositive rulings made in this order, surely Judge Rogers will feel free to make that disagreement known when he makes his dispositive rulings.[3]

In any event, for the reasons set forth below, the motion to intervene of Kansas LULAC, HALO, and A. Doe, J. Doe, and L. Doe, will be granted. The motion for protective order by the Doe intervenors, however, will be denied.

II. Analysis and Discussion.

A. Motion for Intervention.

As mentioned earlier, the proposed intervenors include three undocumented alien students, A., J., and L. Doe, who allegedly meet the conditions required by HB 2145 and who are benefitting from new law, i.e., they currently are enrolled in Kansas public universities and are paying in-state tuition. In addition, the proposed intervenors include Kansas LULAC and HALO, both of which allege they are membership organizations that "likely include either undocumented students or parents of undocumented students [to] join these three students."[4]

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[3] Judge Rogers will rule, among other dispositive issues, the motions to dismiss filed by the proposed intervenors and the various Kansas state defendants (docs. 41 and 43, respectively). These motions to dismiss probably will not have been fully briefed until mid-March 2005 (*see* doc. 46).

[4] Doc. 11, at 2.

Intervention is governed by Rule 24 of the Federal Rules of Civil Procedure. It provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
>
> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.
>
> . . .
>
> In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The proposed intervenors argue that intervention is appropriate in this case as a matter of right under Rule 24(a)(2), and permissively under Rule 24(b)(2). Plaintiffs, however, argue that the applicable criteria have not been met for either type of intervention.

As explained below, the court finds that the proposed intervenors should be allowed to intervene as a matter of right pursuant to Rule 24(a)(2). Thus, the court need not discuss at length permissive intervention under Rule 24(b)(2).[5]

1. Compliance with Rule 24(c).

Plaintiffs assert that intervention – whether as a matter of right or permissive – should be denied because the proposed intervenors have failed to comply with Fed. R. Civ. P. 24(c). As applied here, Rule 24(c) requires that a pleading setting forth the proposed intervenors' defenses "accompany" their motion to intervene.

The opening sentence of the motion to intervene suggests that a proposed answer is attached to the motion, but it is not. The court's electronic case filing system reflects, however, that just eighteen minutes after the motion to intervene was filed, the proposed intervenors filed their answer to plaintiffs' original complaint (doc. 15). And, after plaintiffs filed an

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[5] If the court were to address the issue of permissive intervention at length, that issue very likely would be resolved in favor of the proposed intervenors. That is, as discussed in section II(A)(4) of this decision, it is clear that the motion to intervene is timely. There are common questions of law and fact between the proposed intervenors' defenses and plaintiffs' claims. And the intervention will not unduly delay or prejudice the rights of the original parties. Therefore, permissive intervention appears appropriate under Rule 24(b)(2). *See Ames v. Uranus, Inc.*, No. 92-2170, 1992 WL 281399, at *1 (D. Kan. Sept. 14, 1992).

amended complaint (doc. 38), the proposed intervenors filed an answer to the amended complaint (doc. 40).

Technically, the court believes, the proposed intervenors should not have filed an answer before obtaining leave to intervene. But Rule 24(c) is less than clear with regard to whether any unsigned copy of the complaint or answer of the proposed intervenor should be attached as an exhibit to the motion for intervention, or whether the complaint or answer of the proposed intervenor simply should be signed and filed. The former seems preferable (i.e., less presumptuous), and indeed that approach is implicitly sanctioned by Form 23 in the Appendix to the Federal Rules of Civil Procedure. Still, though, plaintiffs have cited no authority for the proposition that the suggested form absolutely must be followed. Given that even plaintiffs acknowledge that the rationale of Rule 24(c) is simply to put the court (and the non-moving party) in a meaningful position to determine whether intervention is appropriate,[6] and given the state of the record in this case, it seems a bit of a stretch for plaintiffs to argue that Rule 24(c) constitutes any serious impediment to the court granting intervention. To accept plaintiffs' Rule 24(c) argument here would elevate form over substance, something the court naturally declines to do.

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[6] *See Hill v. Kansas Gas Serv. Co.*, 203 F.R.D. 631, 634 (D. Kan. 2001).

2. The Proposed Intervenors' Interest in the Controversy.

Intervention of right pursuant to Rule 24(a)(2) should be allowed "where no one would be hurt and greater justice could be attained."[7] Plaintiffs do not appear to contend that any party would be harmed by allowing the proposed intervention. Instead, the gist of plaintiffs' argument is that the proposed intervenors do not have a legally protectable interest "relating to the property or transaction which is the subject of" this action, as required by Rule 24(a)(2).

"To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."[8] It is well-established in this regard that educational benefits created by statute are property interests that cannot be taken away without adherence to the minimum procedural requirements of Due Process.[9]

The anonymous proposed intervenors, as noted above, currently are benefitting from HB 2145, in that they are attending Kansas public universities and paying favorable in-state tuition rates. Likewise,

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[7] *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001).

[8] *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

[9] *See Goss v. Lopez*, 419 U.S. 565, 574 (1975).

plaintiffs do not seriously dispute that HALO and Kansas LULAC have members who are entitled to exercise their rights under HB 2145 as the law currently stands.

Plaintiffs argue that HB 2145 cannot create a property interest because the law is unconstitutional. Plaintiffs also argue that previous cases holding that educational benefits were a property interest must be interpreted as limited to instances where the beneficiary is a citizen of the United States. Finally, plaintiffs argue that any right created by HB 2145 is not substantial enough to rise to the level of constitutional protection, since HB 2145 does not create a right to education, but rather only a right to reduced tuition.

As earlier indicated, plaintiffs' primary argument is that the statute at issue cannot create a property interest because the statute is unconstitutional. This argument is circular and thus wholly unpersuasive. Regardless of today's ruling on the issue of intervention, Judge Rogers later will decide the merits of plaintiffs' constitutional challenge to HB 2145. Presently, though, HB 2145 is the law of the state of Kansas, and that law creates a right to in-state tuition for certain undocumented aliens. Unless *and* until it is ultimately decided that HB 2145 is unconstitutional, the law is in force and, as such, is sufficient to confer a legally protectable interest in the proposed intervenors.

Plaintiffs' second argument, that the Due Process Clause of the Fourteenth Amendment protects only educational rights of United States citizens, is equally

without merit. That is, it is well-established that Due Process protections inure to undocumented aliens residing in the United States.[10]

Plaintiffs' third argument, that the purported right at stake is not substantial enough to merit constitutional protection, also fails. Whether a student is required to pay nonresident or in-state tuition is an issue that the Supreme Court addressed in a different context in *Vlandis v. Kline*.[11] The court construes the opinion in that case as determining that the right to be treated as a resident for state college tuition purposes is a cognizable right for Due Process purposes. Even were the proposed intervenors' interest considered only economic, it is well-settled that monetary interests related to a case may be protected through intervention.[12] Moreover, the court has found no law requiring that the interest required by Rule 24(a)(2) be a "fundamental" interest, at least as argued and defined by plaintiffs.[13]

Therefore, the court concludes that the proposed intervenors do have an interest in this case and that they have satisfied that portion of Rule 24(a)(2). Further, for essentially the same reasons, the court

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[10] *See Plyler v. Doe*, 457 U.S. 202, 210 (1982).

[11] 412 U.S. 441 (1973).

[12] *See Utah Ass'n of Counties*, 255 F.3d at 1252.

[13] Cases have called this interest a "substantial legal interest." *Id.*, at 1253. The court concludes that the proposed intervenors have alleged a substantial legal interest in this controversy.

concludes that the proposed intervenors' ability to protect that interest may be impaired or impeded by the disposition of this action.

3. Adequate Protection of the Proposed Intervenors' Interests.

Under Rule 24(a)(2), the proposed intervenors must show that their interests are not adequately represented by the current parties. The Tenth Circuit in this regard has stated:

> Although an applicant for intervention as of right bears the burden of showing inadequate representation, that burden is the minimal one of showing that representation may be inadequate. The possibility that the interests of the applicant and the parties may diverge need not be great in order to satisfy this minimal burden.[14]

The proposed intervenors have satisfied their minimal burden. As noted above, the current defendants include the Governor of Kansas and various university officials who are responsible for implementing HB 2145. To the court's knowledge, none of these existing defendants are or ever will be personally impacted by HB 2145. The proposed intervenors may have access to evidence that the

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[14] *Id.*, at 1254 (citations and quotations omitted).

government of the state of Kansas and the officials of Kansas colleges may not have.[15]

The existing defendants presumably are seeking to protect the interests of the public in Kansas, as well as the global interests for all of the public Kansas universities. Although these defendants and the proposed intervenors would be on the "same side" of the case and as such generally opposed to plaintiffs' arguments, the private interests of the proposed intervenors may diverge from the above-described public interests at some point. This is particularly true where, as here, the proposed intervenors' private interests are viewed by some in state government as controversial (and thus politically risky) public policy interests. In this regard, the record reflects that, on July 21, 2004, three weeks after HB 2145 went into effect and just two days after this suit was filed, Kansas Attorney General Phil Kline issued a press release which indicated that he would not "personally" involve himself in this case, even though typically it would be the Attorney General's obligation to defend the Governor and the other state officials sued by plaintiffs. Mr. Kline justified this decision by stating that his personal and political beliefs conflict with defendants' position in this case. Mr. Kline thus decided to "delegate" the defense of the case to his office's Civil Litigation Division.[16] The court neither

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[15] *See id,* at 1255 (citing *Nat'l Farm Lines v. Interstate Commerce Comm'n*, 564 F.2d 381 (10th Cir. 1977)).

[16] *See* Exhibit 1 to memorandum in support of motion to intervene (doc. 12).

compliments nor castigates Mr. Kline's decision. But, as a practical matter, Mr. Kline's ambivalence highlights the very real risks to which the proposed intervenors would be exposed if intervention were not allowed.

Simply stated, although a "presumption of adequate representation arises when an applicant for intervention and an existing party have the same ultimate objective in the litigation,"[17] this presumption is rebutted when the public interest represented by the existing parties "may differ from the would-be intervenor's particular interest."[18] The court finds that the proposed intervenors have rebutted the presumption of adequate representation. Further, the court finds that the existing defendants, despite the best of intentions, may not adequately represent the proposed intervenors' interests in this case.

4. Timeliness of the Motion for Intervention.

Plaintiffs filed this case on July 19, 2004. The proposed intervenors moved to intervene three months later, on October 20, 2004. Notably, when the motion to intervene was filed, no significant motions had been filed, and no case management deadlines had been set.

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[17] *Utah Ass'n of Counties*, 255 F.3d at 1255 (citing *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996)).

[18] *Id.* (citing *Coalition of Ariz./New Mexico Counties for Stable Econ. Growth v. Dept. of Interior*, 100 F.3d 837, 845 (10th Cir. 1996)).

That is, the initial scheduling conference in this case was not held until November 9, 2004.[19]

The court assesses the timeliness of a motion for intervention under Rule 24 "in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances."[20] Courts have held that intervention was timely even where three years had passed since the filing of the complaint.[21]

Plaintiffs have not shown how, if at all, they would be prejudiced by allowing intervention here. The existing defendants do not oppose intervention. The movants, for the reasons stated above, clearly would be prejudiced by denying leave to intervene. There was no undue delay in moving to intervene. The court concludes that the motion to intervene in this case was made in a timely manner and thus satisfies this requirement of Rule 24.

5. Standing of HALO and Kansas LULAC.

Plaintiffs argue that HALO and Kansas LULAC, both unincorporated associations, lack standing to sue on behalf of their members in this case. The proposed intervenors argue that standing is not a requirement

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[19] *See* doc. 27.

[20] *See Sanguine, Ltd. v. United States Dep't of Interior*, 736 F.2d 1416, 1418 (10th Cir. 1984).

[21] *See Utah Ass'n of Counties*, 255 F.3d at 1250.

for their intervention. In fact, there is a split among the circuits regarding whether an intervenor must meet the standing requirements of Article III. It appears that this issue still is unresolved in the Tenth Circuit. In any event, it seems unnecessary here for the court to determine whether standing is a requirement in intervention cases. This is because the proposed intervenors seek to intervene as *defendants*. That is, standing must be proven by the party invoking federal jurisdiction, typically the plaintiff. The Supreme Court has held that Article III standing requirements are met as long as at least one or more of the plaintiffs have a personal stake in the outcome of the controversy.[22] Therefore, the court concludes that standing requirements (if indeed standing is required for defendants at all) would be met here because the standing of at least some of the proposed intervenor-defendants (i.e., A. Doe, J. Doe, and L. Doe) is not challenged by plaintiffs on any basis other than the previously rejected (i.e., circular) argument that HB 2145 is unconstitutional.

But even assuming for the sake of discussion that there is a requirement that must be met for all of the proposed defendant intervenors, the undersigned magistrate judge concludes, for the reasons explained below, that HALO and Kansas LULAC also satisfy

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[22] *See Buckley v. Valeo*, 424 U.S. 1, 12 (1976); and *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981). In this regard, it should be noted that, via recently filed motions to dismiss, *plaintiffs'* standing in this litigation has been challenged by the existing defendants as well as the proposed intervenors. *See* docs. 41-44.

standing requirements in this case. Of course, should Judge Rogers disagree on this point, that certainly is his prerogative.

The Supreme Court has outlined a three-part test for deciding whether an association has standing to sue on behalf of its members.[23] Under this test, at least as restated by the Tenth Circuit, "[a]n association has standing when '(a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'"[24]

HALO and Kansas LULAC meet all three of these requirements. HALO asserts that its membership at Kansas State University includes undocumented Kansas students. Kansas LULAC represents that it does not ask its members about their residency or citizenship status, but maintains that its activities serve the interests of undocumented students, and that it "probably" has such students among its membership. In any event, Kansas LULAC's activities will potentially be harmed if plaintiffs prevail in this

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[23] *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

[24] *Bressler v. Amer. Fed'n of Human Rights*, 44 Fed. Appx. 303, 343 (10th Cir. 2002) (citing *Hunt*, 432 U.S. at 343).

case.[25] Therefore, the court concludes that the individual members of these organizations would be entitled to bring suit on their own behalf and that the interests HALO and Kansas LULAC seek to protect are germane to those groups' purposes. Finally, it does not appear that any of the claims asserted, or the relief requested, require the members of these organizations to individually participate in this case. Therefore, the court concludes that the proposed intervenors meet any standing requirements which may exist in this case.

For the reasons set forth above, the court concludes that the proposed intervenors have satisfied all of the requirements of Fed. R. Civ. P. 24(a)(2). The motion to intervene therefore is granted, as a matter of right.

B. Motion for Protective Order.

As earlier indicated, A., J., and L. Doe have asked the court to enter a protective order which would allow them to continue to proceed anonymously in this case. Each of these proposed intervenors allegedly are students at Kansas public colleges, and each lacks lawful immigration status. They moved to the United States from Mexico with their parents.[26] Each of these proposed intervenors, through counsel, asserts:

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[25] *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (organization must show that its activities or its members will suffer injury).

[26] The court presumes that all three of these anonymous intervenors were brought here as minors. However, the motion is silent as to whether this is true of L. Doe.

> She is concerned that if her identity as an undocumented person became known, that certain members of the community might threaten or otherwise make difficult her continued presence at school. She also fears that someone might report her presence and that of her family to the U.S. Citizenship and Immigration Services, jeopardizing the life they have made here.[27]

In addition, and more particularly, A. Doe has stated under oath:

> While I have been a student at the University of Kansas, several students have come to me to complain about "immigrants" and "illegal aliens" working in Kansas. These complaints have not been directed at me but at others, notably "those in Garden City." I have little doubt that if these students knew I was undocumented and seeking to support AB 2145 [sic], I would become the object of substantial ill feeling and possibly retaliation. I am thus fearful for my safety if my identity became known.
>
> If my identity becomes known, I am fearful that someone would report my parents and me to the immigration authorities. In the four and

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[27] Doc. 13, at 2. This particular paragraph refers to A. Doe. However, other than differences in language to account for the gender of the student, the allegations of each of the anonymous intervenors are identical.

> one-half years since we arrived in the United States, we have created a productive life in Kansas. To be deported would create a terrible hardship on all of us.[28]

And L. Doe similarly has stated:

> I am fearful that if my identity were made known to the general public through this case that it would jeopardize the continued residence of myself, my brother, and my parents, who sacrificed so much to make a new life here in Kansas. This fear is based on the fear that our identity would be reported to immigration officials who would seek to deport us to Mexico, where we no longer have anything.
>
> I also am fearful that public identity of my status could lead fellow students who do not agree with the lawsuit and who may be hostile to undocumented persons to treat me badly at school. This would be a change from my current situation in which I have fully integrated into the KSU community.[29]

The intervenors propose an order which would allow plaintiffs to learn their identities, but which would prevent disclosure of their identities to any non-parties. Plaintiffs oppose this motion on two grounds. First, plaintiffs argue that the court lacks the power to

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[28] Doc. 37, Attach. 1, at ¶¶ 5-6.

[29] Doc. 37, Attach. 2, at ¶¶ 4-5.

prevent any of the parties from disclosing information to the United States Department of Immigration and Customs Enforcement ("ICE") with regard to any undocumented alien. And secondly, plaintiffs argue that these proposed intervenors' immigration status is not the type of personal information that merits the requested relief.

Fed. R. Civ. P. 26(c) provides that a court, upon a showing of good cause, "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." As the parties seeking a protective order, the proposed intervenors of course must show that good cause exists to warrant such an order.[30] "To establish good cause, [the] party must submit 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'"[31]

As a preliminary matter, but ultimately quite significantly, the court finds that the proposed intervenors have *not* met the specificity requirement of Rule 26(c). Although the court understands and appreciates the potential stigma attached to the anonymous intervenors' undocumented status, the court finds that the sparse record, with only very vague and conclusory allegations regarding this stigma

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[30] *Bryan v. Eichenwald*, 191 F.R.D. 650, 651 (D. Kan. 2000) (citing *Sentry Ins. v. Shivers*, 164 F.R.D. 255, 256 (D. Kan. 1996)).

[31] *Id.* (citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16 (1981)).

and possible retribution, are not particular enough to warrant a protective order.

As to the more substantive, practical matter of whether this motion *would* be granted in this case upon a more specific showing, the court will address the two principal legal questions briefed by the parties. First, does federal law bar the court from preventing disclosure of immigration status? Second, is undocumented alien status the type of personal information the court should protect by allowing parties to proceed anonymously? As explained in more detail, the answers to both of these questions is "No."

1. The Court's Power to Take the Action Requested.

Plaintiffs assert that 8 U.S.C. §§ 1373 and 1644 preclude this court "from ordering that parties to this case or their counsel not disclose the proposed intervener's [sic] identities to the public or the federal government."[32] Plaintiffs, at best, are only partially correct in this assertion.

8 U.S.C. § 1373 provides:

> Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, ***any government entity or official*** from sending to, or receiving from, the Immigration and Naturalization Service

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[32] Doc. 32, at 12.

> information regarding the citizenship or immigration status, lawful or unlawful, of any individual. (Emphasis added.)

8 U.S.C. § 1644 is similarly limited. It is clear from the plain language of these statutes that they only apply here to the extent that this court would purport to prevent disclosure *by a government entity or official to ICE*. Nothing in either of these statutes precludes the court from ordering *plaintiffs*, who are private citizens instead of government officials, to refrain from disclosing the information at issue.

There is nothing in the record from which it can reasonably be inferred that the government officials who are defendants of record have any interest in "outing" the proposed intervenors as undocumented aliens. Notably, none of the defendants have filed any opposition to the motion for a protective order. The only parties opposed to entry of such an order are plaintiffs.

In any event, despite plaintiffs' disturbingly casual reading of 8 U.S.C. §§ 1373 and 1644, the court finds that it clearly *does* have the power to preclude plaintiffs from disclosing immigration status information to any person or entity, including ICE. Since the court has the power and discretion to enter the requested order, at least to the extent that it would bind plaintiffs, the court will proceed to examine whether such an order is appropriate in this particular case.

2. Whether Immigration Status is the Type of Personal Information that Warrants Leave to Proceed Anonymously.

Proceeding under a pseudonym in federal court is, by all accounts, "an unusual procedure."[33] Moreover, there does not appear to be any specific statute or rule supporting the practice.[34] In *Femedeer v. Haun*, the Tenth Circuit held that "[t]o the contrary, the Federal Rules of Civil Procedure mandate that all pleadings contain the name of the parties, and Rule 17(a) specifically states that '[e]very action shall be prosecuted in the name of the real party in interest.'"[35]

However, like other courts, the Tenth Circuit has "recognized that there may be exceptional circumstances warranting some form of anonymity in judicial proceedings."[36] Although totally ignored by the proposed intervenors as well as the plaintiffs, in *Femedeer* the Tenth Circuit adopted the following standard:

> Lawsuits are public events. A plaintiff should be permitted to proceed anonymously only in exceptional cases involving matters of highly

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[33] *M.M. v. Zavaras*, 139 F.3d 798, 800 (10th Cir.1998) (quotation omitted).

[34] *See id.*

[35] 227 F.3d 1244, 1246 (10th Cir. 2000) (citing Fed. R. Civ. P. 10(a), and quoting Fed. R. Civ. P. 17(a)).

[36] *Id.*

> sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. The risk that a plaintiff may suffer some embarrassment is not enough.[37]

The Tenth Circuit also has "held that it is proper to weigh the public interest in determining whether some form of anonymity is warranted."[38]

In *Femedeer,* the Tenth Circuit was called upon to determine whether a convicted sex offender should be allowed to proceed anonymously in order to conceal his sex offender status. The subject of the litigation was whether Utah's sex offender registry was unconstitutional. Since the ultimate goal of plaintiff's case was to keep his sex offender status from becoming public knowledge, plaintiff wanted to proceed anonymously with his attack on the registry law.

As the Tenth Circuit stated in *Femedeer*, "the public has an important interest in access to legal proceedings, particularly those attacking the constitutionality of popularly enacted legislation."[39] The court also found that the plaintiff in that case had not "established real, imminent personal danger."[40]

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[37] *Id.* (quoting *Doe v. Frank*, 951 F. 2d, 320, 324 (11th Cir. 1992)).

[38] *Id.*, citing *Zavaras,* 139 F.3d at 802-03.

[39] *Id.*

[40] *Id.*

Finally, the court concluded that the disclosure of his "identity in the caption of [the] lawsuit is not coterminous to the harm he is seeking to avoid by filing [his] claim . . .. Ordinarily, those using the courts must be prepared to accept the public scrutiny that is an inherent part of public trials."[41]

Although the undersigned magistrate judge believes that Tenth Circuit precedent is absolutely binding here, it should be noted that other courts dealing with this issue of anonymity have looked at various factors that have relevance to the case at bar:

> whether the justification asserted by the requesting party is merely to avoid the annoyance and criticism that may attend any litigation or is to preserve privacy in a matter of sensitive and highly personal nature; whether identification poses a risk of retaliatory physical or mental harm to the requesting party or even more critically, to innocent non-parties; the ages of the persons whose privacy interests are sought to be protected; whether the action is against a governmental or private party; and, relatedly, the risk of unfairness to the opposing party from allowing an action against it to proceed anonymously.[42]

The court, as noted above, appreciates the fact that undocumented alien status is a sensitive matter.

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[41] *Id.*

[42] *James v. Jacobsen*, 6 F.3d 233, 238 (4th Cir. 1993).

However, particularly in this day and age (as witnessed by the very enactment of HB 2145), this sort of information strikes the court as fundamentally distinguishable from the type of "highly personal" information that has led other courts to grant leave to proceed anonymously, such as in *Doe v. A Corp.*[43] and *Doe v. United Serv. Life Ins. Co.*[44] Likewise, as distinguished from cases like *Roe v. Wade*,[45] and the five cases upon which the Doe parties heavily rely,[46]

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[43] 709 F.2d 1043, 1044 n. 1 (5th Cir.1983) (anonymity of both parties warranted to protect attorney-client privilege).

[44] 123 F.R.D. 437, 439 (S.D.N.Y. 1988) (anonymity allowed because of sensitive privacy and retaliation concerns in suit by homosexual against insurance company alleging discriminatory practices; no unfairness to defendant who was aware of claimant's true identity).

[45] 410 U.S. 113 (1973). It does not appear that the plaintiff's anonymity was contested in *Roe v. Wade*. In any event, Ms. Roe's desire to have an abortion in contravention of an existing Texas statute clearly rises to the level of the "highly personal" information that is safeguarded through anonymous proceedings.

[46] *Doe v. Miller*, 573 F. Supp. 461 (N.D. Ill. 1983); *John Doe I. v. Meese*, 690 F. Supp. 1572 (S.D. Tex. 1988); *John Doe I v. Georgia Dep't of Public Safety*, 147 F. Supp. 2d 1369 (N.D. Ga. 2001); *Carmen Doe v. Wilson*, 67 Cal. Rptr. 2d 187 (Cal. Ct. App. 1997); and *Doe v. Comm'r of Transitional Assistance*, 773 N.E. 2d 404 (Mass. 2002). The Doe parties cite these five cases in their reply brief (doc. 37), to support the proposition that "[t]he overwhelming authority supports anonymity for undocumented persons." But the Doe parties fail to mention that none of these five cases states any rationale or analysis to justify the decision to allow undocumented

the anonymous intervenors are not challenging a criminal statute, such that the outcome of this case would change whether they were violating federal laws. Nor are the proposed intervenors challenging the constitutionality of the laws which make their immigration status illegal, i.e., regardless of the outcome of this case, the anonymous intervenors probably will continue to be undocumented aliens. This case will only affect the amount of tuition they will be asked to pay to attend public Kansas universities. This factor weighs against entry of a protective order.

The anonymous intervenors have alleged a general fear of stigma and retaliation if their identities are disclosed. However, as noted above, the record simply does not support the relief that they have requested. That is, the court finds that the vague, conclusory allegations by the Doe parties do not support the entry of a protective order. The anonymous intervenors claim that they are afraid of risking deportation but, according to the representations set forth in their motion to intervene, these students already have sworn out affidavits attesting that they are taking all necessary steps to obtain legal citizenship. The court would be astonished if the anonymous intervenors were a top ICE priority, given their representations that they are attempting to obtain legal status. This weighs against entry of a protective order.

As to the effect disclosure may have on the anonymous intervenors' families, this weighs in favor

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persons to litigate anonymously. Therefore, these cases are unpersuasive.

of granting the motion for a protective order, but only slightly. The intervenors' families are non-parties and might be considered "innocent." However, this is always the case when an undocumented alien files a lawsuit that does not also involve his or her family members. The court declines to adopt in effect what would be a general rule protecting illegal immigration status of non-party family members. Nor does the court believe that the circumstances of the instant case merit any special consideration for those family members.

None of the anonymous intervenors are minors. Thus, their ages do not support entry of a protective order. As to whether the action is against a government agency, that consideration is moot in the instant case; the government actors involved in this lawsuit are on the same side and seek the same outcome as the anonymous intervenors. In that respect, this case again dramatically differs from *Roe v. Wade* and the like, where the risk of government retaliation was a substantial consideration. Therefore, neither of these factors weigh in favor of entry of a protective order.

Finally, it must be acknowledged that granting the requested protective order would not result in any harm to plaintiffs. The anonymous intervenors have proposed a protective order which would allow plaintiffs to know the intervenors' identities, but would require plaintiffs not to disclose those identities to any non-parties. The court does not believe that any party would be injured by such an order. This factor weighs in favor of entry of a protective order.

The court concludes that, on balance, the relevant considerations militate against entry of a protective order. And in any event, as noted above, in the first instance, the record is such that the anonymous intervenors have not provided a particularized showing of need or other circumstances warranting an order granting leave to proceed anonymously.

III. Conclusion and Order.

The court grants the motion to intervene filed by Kansas LULAC, HALO, and A., J., and L. Doe (**doc. 11**). The court, however, denies the motion for a protective order to allow the Doe defendants to continue to proceed anonymously (**doc. 13**). The five intervenors shall file an amended answer to plaintiffs' amended complaint by **March 4, 2005**. The caption and the body of their amended answer shall include the true names of all the intervenors.

IT IS SO ORDERED.

Dated this 24th day of February, 2005, at Kansas City, Kansas.

s/ James P. O'Hara
James P. O'Hara
U.S. Magistrate Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 05-3309

[Filed December 17, 2007]

KRISTEN DAY; SONNA L. DAY; CODY ECHOLS; DAVID C. EICHMAN; BRANDI P. GILLETTE; CHRISTOPHER J. HEATH; AMY E. HUGHES; JERALDYN L. HUGHES; KENNETH H. HUGHES; NICOLE C. KEENE; HEIDI L. LANDHERR; ROBERTA K. MACGREGOR; ROBERT R. MANZEL; KARLA A. MANZEL; KAYLA L. MANZEL; JONATHAN D. MILLER; MARY L. MILLER; LASHONDA M. MONTGOMERY; MICHELLE PRAHL; KYLE ROHDE; MARCY R. RUTAN; JOSHUA B. SHEADE; JAMIE WHITTENBERG; LINDSEY D. WHITTINGTON,

Plaintiffs-Appellants,

v.

RICHARD BOND, Chairman of the Kansas Board of Regents; DONNA L. SHANK; JANICE DEBAUGE; WILLIAM R. DOCKING; LEWIS L. FERGUSON; FRANK GAINES;

NELSON GALLE; JAMES GRIER, III; DERYL W. WYNN, Members of the Kansas Board of Regents in their official capacity; CINDY DERRITT, Registrar of the University of Kansas in her official capacity; MONTY NIELSON, Registrar of Kansas State University in his official capacity; LEHYMANN F. ROBINSON, Registrar of Emporia State University in his official capacity,

Defendants-Appellees,

KANSAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS; THE HISPANIC AMERICAN LEADERSHIP ORGANIZATION, Kansas State Chapter; A. DOE; J. DOE; L. DOE,

Defendants-Intervenors-Appellees,

KATHLEEN SEBELIUS, personally and in her official capacity as Governor of Kansas,

Defendant.

HONORABLE ALAN K. SIMPSON; HONORABLE LAMAR S. SMITH; WASHINGTON LEGAL FOUNDATION; THOMAS J. BRENNAN; ZAN BRENNAN; BRIGETTE BRENNAN; ALLIED EDUCATIONAL FOUNDATION; KANSAS ASSOCIATION OF SCHOOL BOARD, INC.,

Amici Curiae.

ORDER

Before **LUCERO**, Circuit Judge, and **MCWILLIAMS** and **EBEL**, Senior Circuit Judges.

EBEL, Senior Circuit Judge.

Plaintiffs-Appellants filed a petition for rehearing and for consideration en banc seeking review of our decision affirming the dismissal of their preemption and equal protection claims.[1] In the district court, Plaintiffs challenged a Kansas statute—Kan. Stat. Ann. § 76-731a—that allows certain non-U.S. citizens to pay in-state tuition rates while attending Kansas post-secondary educational institutions. The district court dismissed each of the relevant claims for lack of standing.

On appeal, we affirmed the district court's dismissal of Plaintiffs' equal protection claim for lack of standing. *Day v. Bond*, 500 F.3d 1127, 1130 (10th Cir. 2007). We then addressed Plaintiffs' preemption claim, and noted that "[t]he only form of injury that the Plaintiffs assert in support of their standing to make this preemption claim is the invasion of a putative statutory right conferred on them by [8 U.S.C.] § 1623." *Id.* at 1136. Accordingly, to determine if Plaintiffs had alleged the requisite injury in fact necessary for standing purposes, we analyzed whether § 1623 confers a private right of action. *Id.* We affirmed the district court's dismissal of the

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[1] *See Day v. Bond*, 500 F.3d 1127 (10th Cir. 2007), for a full discussion of the facts in this case.

preemption claim after concluding that Plaintiffs lacked standing because § 1623 did not confer a private right of action. *Id.* at 1139.

After reviewing Plaintiffs' petition, we conclude that Plaintiffs' arguments do not justify rehearing because our decision does not conflict with prior decisions of the Supreme Court, the Tenth Circuit, or our sister circuits.[2] We recognize, however, that certain facets of this case are complex and that additional explanation may clarify the logic supporting our conclusions. Accordingly, we address below why it is appropriate to deny Plaintiffs' request for rehearing in spite of two of the issues raised in the petition.[3]

I. Whether our opinion concluded that preemption claims generally require a plaintiff to demonstrate a private right of action, and if so, whether our opinion conflicts with precedent from the Tenth Circuit, our sister circuits, and the Supreme Court

First, Plaintiffs contend that our opinion concludes that a private right of action is a necessary prerequisite in all instances to establish federal question jurisdiction for preemption claims. They

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[2] The petition was circulated to all members of the court who are in active service. No judge called for a poll. Accordingly, the request for rehearing en banc is denied.

[3] We find no merit in any of the other issues raised in the petition for rehearing and do not feel that further discussion of those matters is warranted.

argue that this conclusion conflicts with prior decisions of the Supreme Court, the Tenth Circuit, and our sister circuits. Plaintiffs, however, apparently misunderstand the nature of our conclusion regarding the relationship between the alleged statutory right and their preemption claim. Their confusion on this point apparently stems from the unique nature of the injury they asserted in relation to their preemption claim. As we recognized in the opinion, Plaintiffs' only form of alleged injury for their preemption claim was "the invasion of a putative statutory right conferred on them by [8 U.S.C.] § 1623." *Id.* at 1136. Therefore, if § 1623 did not confer such a right on Plaintiffs, they would lack *standing* for their preemption claim. Our standing analysis thus required us to analyze whether § 1623 confers a private right of action. *Id.* This is a distinct question from whether a private right of action exists for the purposes of *federal question jurisdiction*.

In support of their contention, Plaintiffs assert that our opinion conflicts with this court's decision in *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004), because our standing analysis required Plaintiffs to demonstrate that § 1623 confers a private right of action. Plaintiffs make much of the language in *Qwest* that states "[a] party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." 380 F.3d at 1266. Our conclusion, however, does not conflict with *Qwest* because there this court did not determine that a plaintiff may bring a preemption claim without *standing*. In fact, the plaintiff in *Qwest* clearly alleged a sufficiently particularized economic injury based on

a newly enacted Santa Fe ordinance.[4] *Id.* at 1262-63. Accordingly, given the clear presence of a particularized injury, this court did not explicitly address that element of the standing inquiry.

Plaintiffs also assert that our opinion is at odds with cases from several other circuits: *Puerto Rico Telephone Co. v. Municipality of Guayanilla*, 450 F.3d 9 (1st Cir. 2006); *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324 (5th Cir. 2005); *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261 (9th Cir. 1994); and *Western Air Lines, Inc. v. Port Authority of New York & New Jersey*, 817 F.2d 222 (2d Cir. 1987). We disagree because each of these cases can be distinguished in the same manner as *Qwest*. Specifically, in each case, the plaintiffs had a sufficiently particularized injury to support standing for their claim. *Puerto Rico Tel. Co.*, 450 F.3d at 11, 16 (plaintiff alleged injury based on a potentially preempted local ordinance that required the plaintiff to pay 5% of its gross revenues to a municipality); *Sanchez*, 403 F.3d at 328 (plaintiff alleged injury based on a potentially preempted state statute that restricted the distribution of federal family planning funds to entities—like the plaintiff—that provided abortions); *Bud Antle, Inc.*, 45 F.3d at 1264–65 (plaintiff alleged injury based on costs of complying with potentially preempted state labor law); *W. Air Lines, Inc.*, 817 F.2d at 223 (plaintiff alleged injury based on a potentially preempted state agency rule

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[4] Specifically, in *Qwest*, the plaintiff alleged that the ordinance would result in a 59% increase in its operating costs in Santa Fe. *See* 380 F.3d at 1262-63.

that prevented the plaintiff from establishing a route between LaGuardia and Salt Lake City airports). Accordingly, in each of the cases cited by Plaintiffs, the court did not have reason to explicitly address the standing issue because the Plaintiffs alleged a particularized injury, and instead only determined that a private right of action under a federal statute that allegedly preempted the offending statute was not a prerequisite to bring a preemption claim. *Puerto Rico Tel. Co.*, 450 F.3d at 14-15; *Sanchez*, 403 F.3d at 334; *Bud Antle, Inc.*, 45 F.3d at 1269; *W. Air Lines, Inc.*, 817 F.2d at 225–26. Therefore, the distinction between these cases and the instant case is clear: only in the instant case are we required to consider the effect of a lack of a private right of action in the context of *standing*.

Plaintiffs also complain that our decision conflicts with Supreme Court precedent. In particular, Plaintiffs argue that our opinion is inconsistent with *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), and *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000). In *Shaw*, the Supreme Court asserted that "[a] plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is preempted by a federal statute which, by virtue of the Supremacy Clause, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve." 463 U.S. at 96 n.14. Similarly, in *Crosby*, the Supreme Court permitted a plaintiff to pursue a preemption claim under the Supremacy Clause even though it was not clear that the federal law at issue gave rise to a private right of action. 530 U.S. at 370-71.

These cases support the general proposition that a federal law need not include a private right of action in order to support *federal question jurisdiction* when a party pursues a preemption claim arising under the Supremacy Clause. *Shaw* and *Crosby* do not, however, support the proposition that a party does not need to establish that it has *standing* before it may pursue such a claim. Thus, these cases do not conflict with our opinion.

II. Whether our decision requiring a private right of action to establish Plaintiffs' standing for their preemption claim conflicts with Tenth Circuit precedent

Additionally, Plaintiffs contend that our decision requiring a private right of action to establish standing for their preemption claim conflicts with a prior Tenth Circuit decision. Specifically, Plaintiffs argue that by requiring them to demonstrate that § 1623 confers a private right of action, our standing analysis for their preemption claim conflicts with *In re Special Grand Jury 89-2*, 450 F.3d 1159 (10th Cir. 2006). In *Grand Jury*, we decided two issues relevant to the standing inquiry in the instant case. First, we noted that an injury in fact only requires an injury to be "the sort of interest that courts think to be of sufficient moment to justify judicial intervention." *Id.* at 1172. Second, we noted that "there is no requirement that the legal basis for the interest of a plaintiff that is 'injured in fact' be the same as, or even related to, the legal basis for the plaintiff's claim." *Id.* at 1173.

Neither of these determinations alter the logic of our opinion in the instant case. As previously stated,

Plaintiffs' only claimed injury in regard to their preemption claim rests on the invasion of a statutory right that Plaintiffs claimed § 1623 conferred on them.[5] Accordingly, *Grand Jury's* statement that a "judicially cognizable interest" can exist even if the interest is not "protected by law" has no effect because Plaintiffs' only claimed injury *relies explicitly and entirely* on their asserted rights under statutory law. Accordingly, in such circumstances, our decision does not conflict with *Grand Jury*.

III. Conclusion

In sum, the cases that Plaintiffs believe conflict with our opinion do no such thing. In each of these cases, it is clear that a sufficiently particularized injury existed in order to support standing. Here however, Plaintiffs have not asserted the existence of any such particularized injury. Although Plaintiffs may generally bring a preemption claim without an implied private right of action, in this particular instance, they do not have standing to do so because they have asserted no separate injury. Accordingly, we DENY the petition for rehearing with suggestion for rehearing en banc.

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[5] Plaintiffs do attempt to assert other injuries in conjunction with their equal protection claims. Our previous opinion addressed those assertions and concluded that they were insufficient to establish standing. Those alleged injuries were not asserted as a basis for their preemption claim. However, if they had been, they would be subject to the same defects and insufficiencies pointed out in our prior discussion regarding the Plaintiffs' equal protection claim.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER
Clerk of Court

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 05-3309

[Filed October 26, 2005]

KRISTEN DAY, *et al.*,	)
	)
Plaintiffs–Appellants,	)
	)
v.	)
	)
RICHARD BOND, Chairman, Kansas Board of Regents, *et al.*,	)
	)
Defendants–Appellees,	)
	)
and	)
	)
KANSAS LEAGUE OF UNITED LATIN AMERICAN CITIZENS, and HISPANIC AMERICAN LEADERSHIP ORGANIZATION,	)
	)
Intervenors-Defendants–Appellees.	)

On Appeal from the United States
District Court for the District of Kansas
Civil Action No. CV-04-04085-RDR
The Honorable Richard D. Rogers, District Judge

AMICI CURIAE BRIEF OF THE HONORABLE ALAN K. SIMPSON AND THE HONORABLE LAMAR S. SMITH IN SUPPORT OF PLAINTIFFS–APPELLANTS URGING REVERSAL

(Oral Argument Has Been Requested)

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[Table of Contents and Table of Authorities
Omitted in this Appendix]

IDENTITY AND INTEREST OF AMICI CURIAE[1]

The Honorable Alan K. Simpson, United States Senator (R-Wyo.), served 18 years in the United States Senate before retiring in 1997. While in the Senate, he was a member of the Senate Committee on the Judiciary and Chairman or Ranking Member of the Subcommittee on Immigration and Refugee Policy. Senator Simpson graduated from the University of Wyoming Law School, served as Assistant to the Attorney General of the State of Wyoming, served for 13 years in the Wyoming House of Representatives, and was director of Harvard University's Kennedy School of Government. Senator Simpson's interest in this litigation is that he was a Senate co-sponsor of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the federal statute at issue in this case.

The Honorable Lamar S. Smith (R-TX) is serving his 10th term as United States Representative to the 21st District of Texas. Congressman Smith serves on the Subcommittee on Immigration, Border Security, and Claims, Committee on the Judiciary. Congressman Smith graduated from Yale University and from the Southern Methodist University School of

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[1] Pursuant to Fed. R. App. P. 29(a), this *Amici Curiae* Brief is filed with the consent of all parties. On October 12, 2005, Kris W. Kobach, Counsel for Plaintiffs–Appellants, consented via e-mail to *Amici* filing this brief; on October 13, 2005, Peter D. Roos, Counsel for Intervenors-Defendants–Appellees, consented via telephone; and on October 17, 2005, Clayton L. Barker, Counsel for Defendants–Appellees, consented via telephone.

Law. Congressman Smith's interest in this litigation is that he was the primary sponsor of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, the federal statute at issue in this case.

STATEMENT OF FACTS

In 1994, California voters passed Proposition 187, a voter initiative that, among other things, would have prohibited illegal aliens from receiving all but the most essential health and medical services. Proposition 187 was challenged immediately in both state and federal courts. *See League of United Latin Am. Citizens v. Wilson*, 997 F.Supp. 1244, 1249 n.1 (C.D. Cal. 1997) (listing five actions filed in federal courts in California). Although many of Proposition 187's provisions were ultimately held unconstitutional, its prohibition on granting illegal aliens postsecondary education benefits remained valid. *League of United Latin Am. Citizens v. Wilson*, 908 F.Supp. 755, 774 (C.D. Cal. 1995).

In August 1995, Representative Lamar S. Smith (R-TX) introduced into the United States House of Representatives a bill to amend the Immigration and Nationality Act to improve deterrence of illegal immigration to the United States; his bill included language similar to that included in Proposition 187 regarding postsecondary education benefits. Immigration in the National Interest Act of 1995, H.R. 2202, 104th Cong. (1995). On March 21, 1996, H.R. 2202 was passed overwhelmingly by the House by vote of 333 to 87. In April 1996, H.R. 2202 was placed on the calendar of the United States Senate, co-sponsored by Senator Alan K. Simpson (R-WY). On May 2, 1996,

the Senate passed H.R. 2202 by a vote of 97 to 3. On September 30, 1996, H.R. 2202 was enacted as the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. 104-208, div. C, title V, 110 Stat. 3009-546–3009-724 (1996) (codified as amended in scattered sections of Titles 8 and 18 U.S.C.).

Section 505 of the IIRIRA provides:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less amount, duration, and scope) without regard to whether the citizen or national is such a resident.

8 U.S.C. § 1623(a).

Section 505 has been federal law since its enactment. In fact, in 2001 and again in 2003 Congress considered amending section 505. The Development, Relief, and Education for Alien Minors (DREAM) Act, S. 1291, 107th Cong. (2001); The DREAM Act, S. 1545, 108th Cong. (2003). Both proposed bills would have replaced section 505 with a program granting certain undocumented aliens postsecondary education benefits. *Id.* Both proposals failed. Further, in 1997, the United States District Court for the Central District of California held that section 505 demonstrated Congress's intent to preempt state law.

League of United Latin Am. Citizens v. Wilson, 997 F.Supp. 1244, 1256 (C.D. Cal. 1997) (holding Proposition 187's provision regarding postsecondary education benefits preempted by federal law).

In spite of the express federal prohibition on granting postsecondary education benefits to illegal aliens, on July 1, 2004, the State of Kansas enacted a statute granting in-state tuition status to certain illegal aliens. Kan. Stat. Ann. § 76-731a (2004). The Kansas statute provides that "Any individual who is enrolled or has been accepted for admission at a postsecondary educational institution as a postsecondary student shall be deemed to be a resident of Kansas for the purpose of tuition and fees for attendance" so long as the student:

> (A) has attended an accredited Kansas high school for three or more years, (B) has either graduated from an accredited Kansas high school or has earned a general educational development (GED) certificate issued within Kansas . . . ; and (C) in the case of a person without lawful immigration status, has filed with the postsecondary educational institution an affidavit stating that the person or person's parents have filed an application to legalize such person's immigration status . . . .

Kan. Stat. Ann. § 76-731a(a), (b)(2).

On July 19, 2004, a group of non-Kansas-resident students and parents of non-Kansas-resident students initiated the instant challenge to the Kansas statute. Plaintiffs allege, *inter alia*, that the Kansas statute is

preempted by federal law, specifically IIRIRA, § 505, and that the Kansas statute violates the Equal Protection Clause of the United States Constitution. *Day v. Sebelius*, 376 F.Supp.2d 1022 (D.Kan. 2005).

Although the Kansas statute facially violates the federal prohibitions contained within the IIRIRA, a question remains before this Court as to whether the IIRIRA creates a private right of action in Plaintiffs. Although a private right of action is not necessary in a claim of preemption, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004) ("A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law."), *Amici* contend that such a right was intended by Congress and that the IIRIRA was drafted carefully so as to grant a private right of action to a class of persons that includes Plaintiffs. Declaration of the Hon. Alan K. Simpson ¶¶ 5–8.[2]

ARGUMENT

I. NO PRIVATE RIGHT OF ACTION IS REQUIRED WHERE STATE LAW HAS BEEN PREEMPTED BY FEDERAL LAW.

When a plaintiff brings a claim that state law has been preempted by federal law, that plaintiff need not show that the federal statute provides a private right of action. *Qwest*, 380 F.3d at 1266 ("A federal statutory

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[2] Senator Simpson's Declaration is attached hereto as an Addendum.

right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law."). "A party may bring a claim under the Supremacy Clause that a local enactment is preempted even if the federal law at issue does not create a private right of action." *Id.*

This Court's holding in *Qwest* is consistent with the view of other Circuits. The Second Circuit, "despite the lack of a private right of action to enforce the statutes" at issue, affirmed the district court's holding that plaintiffs could bring a Supremacy Clause challenge by claiming that the state law was preempted by federal law. *Western Air Lines, Inc. v. Port Auth. of New York and New Jersey*, 817 F.2d 222, 225–226 (2d Cir. 1987). Further, the Eighth Circuit, in its decision holding that no private right of action was necessary in a federal preemption case, noted that plaintiffs were not seeking enforcement of the federal statute at issue. *Wright Elec., Inc. v. Minnesota State Bd. of Elec.*, 322 F.3d 1025, 1028 (8th Cir. 2003). Rather, plaintiffs were seeking to bar enforcement of the state statute and, therefore, a federal, statutory private right of action was unnecessary. *Id.*

Despite of the clear precedent directly on point, the District Court failed to apply the standards enunciated in *Qwest*, instead opting to apply this Court's test for determining if a statute creates a private right of action. *Day*, 376 F.Supp.2d at 1035–1037. As outlined above, a plaintiff need not show that a federal statute creates a private right of action to sustain a claim that the state law was preempted; therefore, the District Court erred in so holding.

II. EVEN IF A PRIVATE RIGHT OF ACTION IS REQUIRED, THE IIRIRA PROVIDES SUCH A RIGHT.

Amici contend that *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004), controls; that is, no private right of action is required when plaintiffs bring a claim of federal preemption. However, if this Court requires a private right of action, the IIRIRA provides such a right. In determining whether a private right of action exists, this Court's decisions have emphasized that the "inquiry focuses on the Congressional intent underlying the particular statute at issue." *Boswell v. Skywest Airlines, Inc.*, 361 F.3d 1263, 1267 (10th Cir. 2004). In determining Congressional intent, courts focus primarily on a single factor: "whether Congress, expressly or by implication, intended to create a private cause of action." *Sonnenfeld v. City and County of Denver*, 100 F.3d 744, 747 (10th Cir. 1996); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15 (1979). In determining Congressional intent, courts examine the statute for "rights-creating language," *Alexander v. Sandoval*, 532 U.S. 275, 288 (2001); that is, language that "explicitly confer[s] a right directly on a class of persons that include[s] the plaintiff." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979); *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981) ("Congressional intent may be discerned by looking to the legislative history and other factors: *e.g.*, the identify of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the state in providing relief."). Courts also look to language identifying "the class for whose especial benefit the statute was enacted."

Cannon, 441 U.S. at 688 n.9. Language that clearly imparts an "individual entitlement" and has an "unmistakable focus on the benefited class" evinces Congressional intent to create a private right of action. *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287 (2002).

The District Court erred in its determination that the IIRIRA did not create a private right of action. *Day*, 376 F. Supp. 2d at 1035–1037. In the IIRIRA, Congress intended to create a private right of action. Declaration of the Hon. Alan K. Simpson ¶¶ 5–8. Section 505 "identif[ies] the class for whose especial benefit the statute was enacted," *Cannon*, 441 U.S. at 688 n.9—those "citizen[s] or national[s] of the United States" attending postsecondary educational institutions, 8 U.S.C. § 1623(a). Further, the statutory text focuses on the benefiting class. Section 505 provides that "unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, or scope)," no illegal alien may receive, on the basis of residence, any postsecondary education benefit. 8 U.S.C. § 1623(a).

In *California v. Sierra Club*, 451 U.S. 287 (1981), the Supreme Court was presented with the question of whether section 10 of the River and Harbors Appropriation Act of 1899, a statute of similar construction to section 505 of the IIRIRA, provides a private right of action. Section 10 of the River and Harbors Act provides:

> The creation of any obstruction not affirmatively authorized by congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be

> lawful to build or commence the building of any [obstruction or structure] in any . . . water of the United States, outside established harbor lines . . . except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army . . ..

33 U.S.C. § 403 (2004). Like section 505, section 10 of the River and Harbors Act begins with a general prohibition on an activity and concludes with an exception to that prohibition. *Id.*; 8 U.S.C. § 1623(a). However, unlike section 505, the River and Harbors Act does not identify an especial beneficiary. *Sierra Club*, 451 U.S. at 294. For this reason, the Supreme Court held that no private right of action was intended by section 10. Section 505 of the IIRIRA differs from section 10 in that it clearly identifies a chosen class of persons; that is, especial beneficiaries—nonresident, United States citizens attending colleges and universities that provide instate tuition status to illegal aliens. 8 U.S.C. § 1623(a).

Finally, Congress carefully drafted section 505 with the intent of creating a valid, enforceable, private right of action. Declaration of the Hon. Alan K. Simpson ¶¶ 5–8. Unlike the vast majority of federal immigration law, which is chiefly concerned with the regulation of immigrant and non-immigrant alien activity, the removal of unlawfully present aliens, and the prosecution of smugglers and employers of illegal aliens, section 505 speaks clearly of benefits to be afforded United States citizens. 8 U.S.C. § 1623(a). Further, section 505 is one of only three provisions in the Immigration and Nationality Act that regulate the

actions of states rather than private persons or entities. *Id.*; the other two provisions regulating states are 8 U.S.C. § 1621 (restricting public benefits for aliens) and 8 U.S.C. § 1644 (providing that communication between state and local government agencies and the Immigration and Naturalization Service shall not be hindered) (an identical provision is also at 8 U.S.C. § 1373). This unique statutory construction evinces congressional intent that section 505 be interpreted differently than other provisions of federal immigration law; that is, that section 505 be read to create a valid, enforceable, private right of action. Therefore, the District Court erred in holding that the IIRIRA did not create a private right of action in Plaintiffs.

CONCLUSION

For the foregoing reasons, the Honorable Alan K. Simpson and the Honorable Lamar S. Smith respectfully urge this Court to reverse the Judgment of the District Court.

DATED this 26th day of October 2005.

Respectfully submitted by:

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[Certificate of Compliance and Certificate of Service Omitted in this Appendix]

ADDENDUM

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case No. 05-3309

KRISTEN DAY *et al.*,	)
	)
Plaintiffs–Appellants,	)
	)
vs.	)
	)
RICHARD BOND, Chairman, Kansas Board of Regents, *et al.*,	)
	)
Defendants–Appellees,	)
	)
and	)
	)
HISPANIC AMERICAN LEADERSHIP ORGANIZATION	)

and KANSAS LEAGUE OF UNITED)
LATIN AMERICAN CITIZENS,)
)
Intervenors-Defendants–Appellees)
)

DECLARATION OF THE HONORABLE ALAN K. SIMPSON

I, Alan K. Simpson, declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the following statements are true and correct to the best of my knowledge:

1. Between January 1979 and January 1997, I was a United States Senator, representing the State of Wyoming.

2. Between 1980 and 1997, I was a member of the United States Senate Judiciary Committee, and served as either chairman or ranking member of the Subcommittee on Immigration and Refugee Policy.

3. I co-sponsored the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") in the United States Senate.

4. Section 505 of the IIRIRA, codified at 8 U.S.C. § 1623, provides:

> Notwithstanding any other provision of law, an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education

benefit unless a citizen or national of the United States is eligible for such a benefit (in no less amount, duration, and scope) without regard to whether the citizen or national is such a resident.

5. It was the Congressional intent that Section 505 create a valid, enforceable right for the "especial benefit" of United States citizens and nationals.

6. The language of Section 505 was clearly crafted to create such a private right of action.

7. I was personally present at many of the meetings of the Subcommittee on Immigration and Refugee Policy and during the deliberations of the House-Senate Conference Committee wherein the language of the IIRIRA was discussed.

8. It was the general impression of the conferees that they intended to create an enforceable, private right of action in Section 505.

DATED this 21st day of October 2005.

/s/ Alan K. Simpson

Hon. Alan K. Simpson,
United States Senator (R-WY, Ret.)
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